APPENDIX

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DISTRICT OF COLUMBIA COURT OF APPEALS

No. 10-CV-20

HARRY R. JACKSON, JR., *et al.*, APELLANTS,

V.

DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS, APPELLEE,

AND

DISTRICT OF COLUMBIA, INTERVENOR-APPELLEE.

Appeal from the Superior Court of the District of Columbia (CAB-8613-09)

(Hon. Judith N. Macaluso, Trial Judge)

(Argued en banc May 4, 2010 Decided July 15, 2010)

Austin R. Nimocks, with whom *Timothy J. Tracey* and *Cleta Mitchell* were on the brief, for appellants.

Rudolph McGann filed a brief for appellee.

Todd S. Kim, Solicitor General for the District of Columbia, with whom *Peter J. Nickles*, Attorney General for the District of Columbia, *Donna M. Murasky*, Deputy Solicitor General, and *Stacy L. Anderson*, Assistant Attorney General, were on the brief, for intervenor-appellee.

D. Jean Veta, Thomas S. Williamson, Jr., Paul A. Ainsworth, Anne Y. Lee, Richard Anthony Lopez and Jonathan Herczeg filed an *amicus curiae* brief for Trevor S. Blake, II, Jeff Krehely, Amy Hinze-Pifer, Rebecca Hinze-Pifer, Thomas F. Metzger, Vincent N. Micone, III, Reginald Stanley, Rocky Galloway, D.C. Clergy United, Lambda Legal Defense and Education Fund, Inc., and the Campaign for All DC Families, in support of appellees.

Miriam R. Nemetz and *Jasmin Sethi* filed an *amicus curiae* brief for the American Psychoanalytic Association, the National Association of Social Workers, the National Association of Social Workers, Virginia Chapter, the National Association of Social Workers, District of Columbia Chapter and the National Association of Social Workers, Maryland Chapter, supporting appellees.

Before WASHINTON, *Chief Judge*, and RUIZ, REID, GLICKMAN, KRAMER, FISHER, BLACKBURNE-RIGSBY, THOMPSON and OBERLY, *Associate Judges*.

Opinion for the court by *Associate Judge* THOMPSON, joined by RUIZ, REID, KRAMER and BLACKBURNE-RIGSBY, *Associate Judges*.

Dissenting opinion by *Associate Judge* FISHER, joined by WASHINGTON, *Chief Judge*, and GLICKMAN and OBERLY, *Associate Judges*, at page 53.

THOMPSON, *Associate Judge*: The specific issue before us in this appeal is whether the District of Columbia Board of Elections and Ethics (the

"Board") acted lawfully when it rejected appellants' proposed initiative measure on the ground that the measure would authorize, or have the effect of authorizing, discrimination prohibited by the Human Rights Act, and therefore was not a proper subject of initiative. As will be seen, however, the underlying issues are much broader and more fundamental. They concern (1) the allocation of the power to enact laws governing the District of Columbia, within the framework of the District of Columbia Home Rule Act; (2) the broad legislative authority that Congress conferred on the Council of the District of Columbia ("the Council" or "the Home Rule Council"), subject to specific enumerated limitations; (3) the deference this court owes to the Council with respect to the meaning of the law that the Council passed to enable the people of the District of Columbia to share in the Council's legislative power through an amendment to the Home Rule Charter, (and, in particular, the deference we owe to the Council's interpretation of the Charter amendments, as reflected in the nearly contemporaneous implementing legislation that the Council passed); (4) the right of the people of the District to legislate through the initiative process, a right that Congress affirmatively approved when it voted to accept the Charter amendment; and (5) the unique importance of the Human Rights Act, the District's comprehensive anti-discrimination law, which the people of the District of Columbia, speaking through their elected representatives, have long intended to have the "highest priority." Thus, once again, we are called upon "to interpret a unique and complex governmental structure" that is the District of Columbia under Home Rule. *Convention*

Ctr. Referendum Comm. v. District of Columbia Bd. of Elections & Ethics, 441 A.2d 889, 916 (D.C. 1981) (en banc) ("*Convention Ctr. III*").

Appellants' challenge focuses on the validity of Council legislation that requires the Board to refuse to accept any proposed initiative that would authorize, or have the effect of authorizing, discrimination prohibited by the Human Rights Act (a requirement that we refer to herein as the "Human Rights Act safeguard"). Specifically, appellants contend that, in establishing that requirement, the Council overstepped its authority and acted in contravention of the District of Columbia Charter. Alternatively, appellants contend that the proposed initiative would not authorize or have the effect of authorizing prohibited discrimination. We disagree with both contentions, and we therefore affirm the Superior Court's rulings that the Council acted lawfully in imposing the Human Rights Act safeguard and that the Board correctly determined that the safeguard required it to reject the proposed initiative. As we go on to explain, we reach this result because (1) resolution of this appeal turns on what legislative authority the Council intended to share with the people of the District of Columbia when it passed the Charter Amendments Act (the "CAA"); (2) the Human Rights Act safeguard is not inconsistent with the Council's intent as conveyed by the language of the CAA; (3) this court owes substantial deference to the Council's legislative interpretation that the Human Rights Act safeguard carries out the intent of the CAA; (4) the relevant history convinces us that the Council could not have intended to authorize, as a proper subject of

initiative, any initiative that would have the effect of authorizing discrimination prohibited by the Human Rights Act; (5) the Home Rule Act gave the Council authority to direct the Board, through the legislation that the Council passed to implement the CAA, to refuse to accept an initiative that would authorize prohibited discrimination; and (6) the Board correctly determined that the proposed initiative would have the effect of authorizing such discrimination. On the last of these points, our court is unanimous.

I. Factual and Procedural Background

On May 5, 2009, the Council passed the Jury and Marriage Amendment Act of 2009 ("JAMA"). D.C. Act 18-70, 56 D.C. Reg. 3797 (May 15, 2009). JAMA amended the District's marriage laws to provide that the District will recognize lawful, same-sex marriages entered into in other jurisdictions. *See* D.C. Code § 46-405.01 (2009 Supp.).[1] JAMA became law on July 7, 2009, after Congress did not disapprove it.

On September 1, 2009, appellants—Harry Jackson, Jr., Robert King, Walter Fauntroy, James Silver, Anthony Evans, Dale Wafer, Melvin Dupree, and Howard Butler—filed with the Board their proposed "Marriage Initiative of 2009," which is the

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[1] The statute states: "A marriage legally entered into in another jurisdiction between 2 persons of the same sex that is recognized as valid in that jurisdiction, that is not expressly prohibited by §§ 46-401.01 through 46-404, and has not been deemed illegal under § 46-405, shall be recognized as a marriage in the District." *Id.*

subject of this appeal. Through the proposed initiative, appellants sought to undo JAMA by amending Title 46, Subtitle I, Chapter 4 of the D.C. Code to state: "Only marriage between a man and a woman is valid or recognized in the District of Columbia." After a public hearing on October 26, 2009, the Board rejected the proposed initiative, finding that it would "authorize[], or . . . have the effect of authorizing, discrimination" prohibited under the Human Rights Act and therefore was "not a proper subject of initiative." D.C. Code § 1-1001.16 (b)(1)(C) (2006).[2] Appellants sought a writ of

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[2] In its entirety, D.C. Code § 1-1001.16 (b)(1) (2006) reads:

> Upon receipt of each proposed initiative or referendum measure, the Board shall refuse to accept the measure if the Board finds that it is not a proper subject of initiative or referendum, whichever is applicable, under the terms of title IV of the District of Columbia Home Rule Act, or upon any of the following grounds:
>
> (A) The verified statement of contributions has not been filed pursuant to §§ 1-1102.04 and 1-1102.06;
>
> (B) The petition is not in the proper form established in subsection (a) of this section;
>
> (C) *The measure authorizes, or would have the effect of authorizing, discrimination prohibited under Chapter 14 of Title 2*; or
>
> (D) The measure presented would negate or limit an act of the Council of the District of Columbia pursuant to § 1-204.46.

mandamus, asking the Superior Court to order the Board to take the necessary steps to certify the initiative to allow it to be placed on the ballot. Appellants also moved for summary judgment. The District of Columbia intervened in support of the Board and moved to dismiss the complaint or, in the alternative, for summary judgment.

In the meantime, the Council adopted the Religious Freedom and Civil Marriage Equality Amendment Act of 2009 (the "Marriage Equality Act") upon its second reading on December 15, 2009. D.C. Act 18-248, 57 D.C. Reg. 27 (Jan. 1, 2010). This legislation, which became effective as D.C. Law 18-110 on March 3, 2010, *see* 57 D.C. Reg. 1833 (Mar. 5, 2010), expanded the definition of marriage in the District to include same-sex couples: "Any person may enter into a marriage in the District of Columbia with another person, regardless of gender, unless the marriage is expressly prohibited by" District law. D.C. Code § 46-401 (a) (Supp. 2010); 57 D.C. Reg. 27 (Jan. 1, 2010). Thus, the Marriage Equality Act makes civil marriage available to same-sex couples, just as it does to opposite-sex couples. It also provides that judges of record, the Clerk of the Superior Court of the District of Columbia or such deputy clerks as the Clerk may designate, and "every minister of any religious society approved or ordained according to the ceremonies of his religious society" may celebrate marriages in the District. *Id.* § 46-406(b). However, it does not require a minister

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Id. (italics added). The italicized language, section 1-1001.16 (b)(1)(C), sets forth what we refer to as the Human Rights Act safeguard.

of any religion to celebrate any marriage. Rather, the Council expressed in the preamble to D.C. Act 18-248 its intent to "ensure that no minister of any religious society . . . shall be required to solemnize or celebrate any marriage." 57 D.C. Reg. 27.[3] The Mayor signed the Marriage Equality Act, it was

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[3] To that end, the Marriage Equality Act explicitly provides that:

> (c) No priest, imam, rabbi, minister, or other official of any religious society who is authorized to solemnize or celebrate marriages shall be required to solemnize or celebrate any marriage.
>
> (d) Each religious society has exclusive control over its own theological doctrine, teachings, and beliefs regarding who may marry within that particular religious society's faith.
>
> (e)(1) Notwithstanding any other provision of law, a religious society, or a nonprofit organization that is operated, supervised, or controlled by or in conjunction with a religious society, shall not be required to provide services, accommodations, facilities, or goods for a purpose related to the solemnization or celebration of a marriage, or the promotion of marriage through religious programs, counseling, courses, or retreats, that is in violation of the religious society's beliefs.
>
> (2) A refusal to provide services, accommodations, facilities, or goods in accordance with this subsection shall not create any civil claim or cause of action, or result in a District action to penalize or withhold benefits from the religious society or nonprofit organization that is operated, supervised, or controlled by or in conjunction with a religious society.

D.C. Code § 46-406 (c)–(e) (Supp. 2010).

transmitted to Congress on January 5, 2010, *see* 57 D.C. Reg. 18 and it became law on March 3, 2010.[4] *Id.*

By the effective date of the Marriage Equality Act, the Superior Court had ruled on the cross-motions for summary judgment in this litigation. On January 14, 2010, the court granted the District's motion for summary judgment, rejecting appellants' argument that the Human Rights Act safeguard provision is an invalid restriction on the right of initiative and agreeing with the Board that appellants' proposed initiative would authorize discrimination. This appeal followed. We ordered that the appeal be heard en banc and granted motions by *amici* to file briefs.

II. Legal Framework

An understanding of the powers of the Council under the Home Rule Act, of the District Charter amendment that created the rights of initiative and referendum, and of the nearly contemporaneous legislation that the Council passed, is critical to our resolution of this appeal. Accordingly, we describe these matters in some detail.

A. The Home Rule Act

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[4] The Superior Court, this court, and Chief Justice Roberts, sitting as Circuit Justice, declined to stay the effective date of the Marriage Equality Act. *See Jackson v. District of Columbia Bd. of Elections & Ethics*, 130 S. Ct. 1279, 1280 (2010) (Roberts, C.J., in chambers).

The Constitution vests Congress with the authority "[t]o exercise exclusive Legislation" over the District. U.S. Const. art. I, § 8, cl. 17. In 1973, Congress passed the District of Columbia Self-Government and Government Reorganization Act, Pub. L. No. 93-198, 87 Stat. 777, commonly known as the "Home Rule Act." Title IV of the Home Rule Act sets out the District of Columbia Charter, which establishes the organizational structure of the District government. D.C. Code §§ 1-204.01–1-204.115 (2006). The Charter became effective when ratified by the citizens of the District of Columbia through a Charter referendum vote. *See* Home Rule Act, §§ 701, 704 (codified at D.C. Code §§ 1-207.01, 1-207.04 (2006)). The Charter created a tripartite form of government within the District and vested in the Council the broad legislative power granted to the District. D.C. Code § 1-204.04; *Wilson v. Kelly*, 615 A.2d 229, 231–32 (D.C. 1992). Section 302 of Title III of the Home Rule Act describes that legislative power in broad terms: "Except as provided in sections 601, 602, and 603 [of the Home Rule Act, codified at D.C. Code §§ 1-206.01 to 1-206.03], the legislative power of the District shall extend to all rightful subjects of legislation within the District consistent with the Constitution of the United States and the provisions of this chapter subject to all the restrictions and limitations imposed upon the states by the 10th section of the 1st article of the Constitution of the United States." D.C. Code § 1-203.02 (2006).[5]

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[5] Sections 601 to 603 expressly restrict the Council's power to legislate in several specific areas. *See* D.C. Code §§ 1-203.02, 1-206.02 (a), 1-206.03 (c) (2006). The Council has "no authority

Under the Home Rule Act, the Council is empowered to pass legislation by a majority vote after two readings, at least thirteen days apart. *See* D.C. Code § 1-204.12 (a). In general, if the Mayor does not veto an act of the Council within ten days (or if the Council overrides a veto by a two-thirds vote), Council-passed legislation becomes effective after a thirty-legislative-day layover in Congress, unless disapproved by concurrent resolution. D.C. Code § 1-206.02 (c)(1) (2006).

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to pass any act contrary to the provisions of [the Home Rule Act]," except as specifically provided in the Act. *Id.* § 1-206.02 (a). The Council may not approve a budget in excess of estimated revenues. *Id.* § 1-206.03 (c). In addition, the Council may not "(1) Impose any tax on property of the United States or any of the several states; (2) Lend the public credit for support of any private undertaking; (3) Enact any act, or enact any act to amend or repeal any Act of Congress, which concerns the functions or property of the United States or which is not restricted in its application exclusively in or to the District; (4) Enact any act, resolution, or rule with respect to any provision of Title 11 (relating to organization and jurisdiction of the District of Columbia courts); (5) Impose any tax on the whole or any portion of the personal income, either directly or at the source thereof, of any individual not a resident of the District . . . ; (6) Enact any act, resolution, or rule which permits the building of any structure within the District of Columbia in excess of the height limitations [established by Congress]; (7) Enact any act, resolution, or regulation with respect to the Commission on Mental Health; [or] (8) Enact any act or regulation relating to the United States District Court for the District of Columbia or any other court of the United States in the District other than the District courts, or relating to the duties or powers of the United States Attorney or the United States Marshal for the District of Columbia." D.C. Code § 1-206.02 (a)(1)–(8).

Part E of Title VII of the Home Rule Act set forth amendments to the District of Columbia Election Act, D.C. Code §§ 1-1101–1-1115 (1973), and also contained a provision, section 752, entitled "District Council Authority Over Elections." Section 771 (c) of the Home Rule Act provided that "Part E of Title VII shall take effect on the date on which title IV is accepted by a majority of the registered qualified electors in the District voting on the charter issue in the charter referendum." Thus, section 752 (codified as D.C. Code § 1-207.52 (2006)), became effective upon ratification of the Charter. Section 752 provides that "[n]otwithstanding any other provision of this Act or of any other law, the Council shall have authority to enact any act or resolution with respect to matters involving or relating to elections in the District." *Id.*

B. The Charter Amendment Act

The legislative history of the Home Rule Act shows that Congress considered including in the Act a provision that would have *directly* conferred on the people of the District the power to propose and enact legislation through an initiative process. *See Home Rule Legislation: Hearing Before the Comm. on the Dist. of Columbia on S. 1603 and S. 1626*, 92d Cong. 161 (1971) (hereinafter, "Hearing on S. 1603 and S. 1626"). As finally enacted, however, the Home Rule Act did not provide for the power of initiative (or of referendum). Section 303 of the Act did, however, provide that the Charter may be amended "by an act passed by the Council and ratified by a majority of the registered qualified electors of the District voting in the referendum held for such ratification." D.C.

Code § 1-203.03(a) (2006).[6] On May 17, 1977, the Council exercised its authority under section 303 to pass the Initiative, Referendum, and Recall Charter Amendment Act of 1977 (the "CAA"). 24 D.C. Reg. 199 (July 8, 1977); *see also* 25 D.C. Reg. 244 (July 14, 1978). The Council amended the CAA on November 1, 1977, making technical changes to the legislation before it was presented to the voters. H.R. Rep. No. 95-891, at 24 (1978). The District's electorate ratified the CAA on November 7, 1977, each House of Congress affirmatively approved it, and the CAA (and, thus, an amended Charter providing for the right of initiative) became effective on March 10, 1978. *Hessey v. District of Columbia Bd. of Elections & Ethics*, 601 A.2d 3, 12 (D.C. 1991) (en banc); *Convention Ctr. Referendum Comm. v. District of Columbia Bd. of Elections & Ethics*, 399 A.2d 550, 551 (D.C. 1979) ("*Convention Ctr. I*"); 25 D.C. Reg. 244 (July 14, 1978).

The CAA, codified at D.C. Code §§ 1-204.101–1-204.115, provides in its definitional section that "[t]he term 'initiative' means the process by which the electors of the District of Columbia may propose

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[6] Section 303 specifically provides, however, that the portions of Title IV relating to establishment of the Council, the Office of the Mayor, and the judicial system as the tripartite form of government are not subject to amendment (except by Congress).

The House-passed Home Rule bill would have permitted initiative petitions for Charter amendments, while the Senate bill would have required all Charter amendments to originate with Congress. The Conference resolution was to permit the Council alone to originate Charter amendments. *See* H.R. Rep. No. 95-890, at 2 (1978) (Conf. Rep.).

laws (except laws appropriating funds) and present such proposed laws directly to the registered qualified electors of the District of Columbia for their approval or disapproval." *Id.* § 1-204.101 (a).[7] The CAA provided a "very broad" right for the District's electorate to utilize the initiative and referendum process.[8] *Hessey*, 601 A.2d at 12. However, the initiative and referendum provisions were not self-executing and did not include particulars about how the initiative or referendum process would be implemented. *Convention Ctr. I*, 399 A.2d at 552–53. Instead, the CAA affirmatively required the Council to "adopt such acts as are necessary to carry out the purpose of [the Act] within 180 days of the effective date of [the Act]." D.C. Code § 1-204.107.

C. The Initiative Procedures Act

On April 10, 1978, a month after the CAA became effective, the Council introduced implementing legislation as Bill 2-317. D.C. Council, Comm. on Gov't Operations, Report No. 1 on Bill 2-317 at 1 (May 3, 1978) (hereinafter, "IPA Report").

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[7] Section 1-204.101 (b) states that "[t]he term 'referendum' means the process by which the registered qualified electors of the District of Columbia may suspend acts of the Council of the District of Columbia (except emergency acts, acts levying taxes, or acts appropriating funds for the general operation budget) until such acts have been presented to the registered qualified electors of the District of Columbia for their approval or rejection." *Id.*

[8] For example, in September 1982, citizens adopted an initiative providing for "severe mandatory minimum sentences for, among others, persons who committed offenses while armed with a pistol or firearm." *Lemon v. United States*, 564 A.2d 1368, 1379 (D.C. 1989).

Many of those who testified before the Council on the bill expressed support for a human rights safeguard in the implementing legislation, and the Committee Report notes that, subsequent to the public hearings on the bill, the Council received "myriad telephone calls" in support. IPA Report, at 4–6. Bill 2-317 was reintroduced as Bill 3-2 in January 1979. *Convention Ctr. I*, 399 A.2d at 553; D.C. Council, Comm. on Gov't Operations, Report on Bill 3-2 at 1 (Jan. 31, 1979). The Council approved Bill 3-2, including the Human Rights Act safeguard, as the Initiative, Referendum, and Recall Procedures Act of 1979 (the "IPA"), which became law on June 7, 1979. D.C. Law 3-1, 1979 & 1980 D.C. Stat 7.[9]

D. The Human Rights Act

In 1973, the pre-Home Rule District of Columbia Council promulgated Title 34 of the District of Columbia Rules and Regulations, known as the "Human Rights Law" (34 DCRR §§ 1.1–35.3 (1973)). Reg. No. 73-22, 20 D.C. Reg. 345 (Nov. 17, 1973). Through the Human Rights Law, the pre-Home Rule Council declared that "[e]very individual shall have an equal opportunity to participate . . . in all aspects of life," 34 DCRR § 9.1, and it announced an intent "to secure an end . . . to discrimination for any reason other than that of individual merit, including, but not limited to discrimination by reason of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, matriculation, political

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[9] The pertinent language of the IPA is set out in note 2 *supra*.

affiliation, physical handicap, source of income, and place of residence or business." *Id.* § 1.1. The pre-Home Rule Council declared that it was using its "prerogative to legislate broadly," and that the Human Rights Law was intended to be "far-reaching." D.C. Council, Econ. Dev., Labor & Manpower Comm., Report on Title 34 at 2 (August 7, 1973) (hereinafter, "Human Rights Law Report"). The pre-Home Rule Council was explicit that it adopted the Human Rights Law pursuant to its police powers, explaining that Title 34 "shall be deemed an exercise of the police power of the District of Columbia, necessary for the protection of lives, limbs, health, comfort and quiet of all persons and the protection of all property in the District of Columbia." 34 DCRR § 1.3.[10]

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[10] The pre-Home Rule Council also explained that:

> The District of Columbia Council hereby finds that the failure to provide equal opportunity to enjoy a full and productive life, whether because of discrimination, prejudice, intolerance or inadequate education, training, housing or health care, not only threatens the rights and proper privileges of its inhabitants, but menaces the institutions and foundations of a free democratic society; and threatens the lives, limbs, health, comfort, quiet of all persons and the protection of all property in the District.

34 DCRR § 1.3.

In enacting the Human Rights Law, the pre-Home Rule Council borrowed the language of a longstanding police regulation that had been enacted by the Commissioners of the District of Columbia pursuant to their authority "to make and enforce all such reasonable and usual police regulations . . . as

"Concerned that [the Title 34] police power regulations might not have the same force and effect as a statute, the post-Home Rule Council of the District of Columbia re-enacted the [Human Rights Law] regulations as The Human Rights Act of 1977." *Blodgett v. Univ. Club*, 930 A.2d 210, 217 (D.C. 2007). The bill (Bill 2-179) that became the Human Rights Act was introduced on June 16, 1977, within a month after the Council passed the original version of the CAA.[11] D.C. Council, Comm. on Pub. Servs. and Consumer Affairs, Report on Bill 2-179 at 1 (July 5, 1977) (hereinafter, the "Human Rights Act Report"). In reporting the bill, the Committee on Public Services and Consumer Affairs Council explained that, in doing so, it made "no substantive

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they may deem necessary for the protection of lives, limbs, health, comfort and quiet of all persons and the protection of all property within the District of Columbia." *See Newsweek Magazine v. District of Columbia Comm'n on Human Rights*, 376 A.2d 777, 781–82 (D.C. 1977). This court held in *Newsweek* that the Human Rights Law was "a valid exercise of the [pre-Home Rule Council's] police power." *Id.* at 782 n.4. We explained that "we view the harmful effects of illegal discrimination . . . to be so deleterious to our society as to affect the 'lives, limbs, health, comfort and quiet of all persons' within the District and thus within the purview of . . . 'reasonable and usual' Police Regulations." *Id.* at 782.

[11] Thus, barely a month after the Council passed the original version of the CAA and before it passed the final version that went to the voters, the Council took action to reinforce the District's far-reaching Human Rights Law. Bill 2-179, which became the Human Rights Act, was sponsored by all thirteen Council members. *See* Memorandum from Anglea B. Howard, Committee on Public Services and Consumer Affairs, to Robert A. Williams at 1 (regarding Substitution of Pages of Committee Report of Bill 2-179, The Human Rights Act of 1977) (July 7, 1977).

changes," but acted with "the sole effect [of] . . . enact[ing] that law as a statute and thus mak[ing] it a permanent part of the District of Columbia Code." *Id.* The Council intended to "reinforce[] . . . [its] view that the Human Rights Act is among our most important laws and is to be vigorously enforced by all agencies and officials of the District Government." *Id.* It also sought to "underscore the Council's intent that the elimination of discrimination within the District of Columbia should have the highest priority . . . and that the Human Rights Act should therefore be read in harmony with and as supplementing other laws of the District." *Id.* at 3. The Council understood that the District's Human Rights Law was "widely hailed as the most comprehensive of its kind in the nation" and sought to put it on "firm legal footing" by re-enacting it as a statute. *Id.* at 2.

The Human Rights Act, which the Council adopted on July 26, 1977, "has remained substantially unchanged since 1977, having been amended only to add new classes to the list of those already protected by the Act." *Blodgett*, 930 A.2d at 218 n.4. The Act continues to provide that "[e]very individual shall have an equal opportunity to participate . . . in all aspects of life, including, but not limited to" those aspects specifically described. D.C. Code § 2-1402.01 (2007). This court has noted that "[t]he Council undoubtedly intended the Human Rights Act to be a powerful, flexible, and far-reaching prohibition against discrimination of many kinds." *Executive Sandwich Shoppe, Inc. v. Carr Realty Corp.*, 749 A.2d 724, 732 (D.C. 2000).

III. The Parties' Contentions

Appellants contend that by refusing to accept their proposed initiative, the Board denied the citizens of the District their "guaranteed right under the District of Columbia Charter to be heard" on the issue of the definition of marriage.[12] In ratifying the CAA, appellants argue, voters conferred upon themselves and all citizens of the District a right to utilize the initiative process with only one limitation—that the initiative process is not available to propose laws appropriating funds (something the parties agree the Marriage Initiative of 2009 does not purport to do). According to appellants, when voters approved the CAA, including its provision requiring the Council to "adopt such acts as are necessary to carry out the purpose of this subpart within 180 days of the effective date of this subpart," D.C. Code § 1-204.107, they authorized the Council only to provide "procedural" rules to facilitate the people's exercise of the right to initiative (and to do so "within 180 days," *id.*). Section 1-204.107 did not, appellants contend, authorize the Council to "impose additional substantive limitations on the people's right of initiative." Thus, appellants say, when the Council enacted the IPA and added the Human Rights Act safeguard, the Council exceeded the authority conferred to it by the CAA. Noting that the Charter Amendments are "in the nature of constitutional

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[12] Appellants assert that "voters in thirty-one states have participated in the initiative and/or referendum process to voice their opinion on . . . the definition of marriage," and urge that the citizens of the District "are also entitled to voice their views through their votes on this important issue."

provisions," *Convention Ctr. III*, 441 A.2d at 915, appellants emphasize that the CAA "cannot be amended or contravened by ordinary legislation [of the D.C. Council.]" *Id.* ("As implementing legislation, the Initiative Procedures Act is valid, of course, only insofar as it conforms to the underlying Charter Amendments"). Appellants urge us to hold that the Human Rights Act safeguard of the IPA conflicts with the broad right of initiative created by the CAA, and therefore "cannot be used as a basis for disapproving the Marriage Initiative of 2009."[13]

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[13] Appellants also assert that citizens of the District may not be subjected to a limit on their ability to propose legislation that diminishes their power relative to that of the Council because, in the process of ratifying the CAA, they "ma[de] themselves coextensive lawmakers with the D.C. Council." For this point, appellants rely heavily on this court's statement in *Atchison v. District of Columbia* that the power of initiative is "coextensive with the power of the legislature to adopt legislative measures." 585 A.2d 150, 155 (D.C. 1991) (quoting *Convention Ctr. III*, 441 A.2d at 897). However, the issue in *Atchison* and in *Convention Ctr. III* was whether the initiative process would permit citizens to propose initiatives that were administrative or executive in nature rather than legislative. We answered that question in the negative by explaining that just as the Council's legislative powers do not extend to administrative matters, "an initiative cannot extend to administrative matters." *Convention Ctr. III*, 441 A.2d at 907. Thus, we held that the voters' legislative power could be no broader than the Council's. *Id.* at 918. We did not consider or address the question raised here, i.e., whether the Council intended to and could lawfully, through the Human Rights Act safeguard, enable citizens to have legislative power that is more limited than the legislative power that the Council itself holds through the Home Rule Act. "It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected but

In contrast, the District contends that the CAA "gave the Council the authority to determine what acts were necessary to carry out its purpose, with no provision for review of that determination by this court or any other body." The District argues that, by giving the Council this authority without defining the purpose and without including words of limitation on the types of acts that the Council could enact to carry out that purpose, the CAA "gave the Council authority broader than that necessary to ensure merely that mechanical procedures exist for initiatives to proceed," and established no "judicially manageable standards for determining whether the Council has properly exercised its discretion." As a result, the District asserts, whether the Human Rights Act safeguard is necessary to the purpose of the CAA is a "nonjusticiable political question." The District emphasizes that the Council itself passed the CAA in the same Council session in which it devised the IPA, suggesting that the Council well

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ought not to control the judgment in a subsequent suit when the very point is presented for decision." *Cent. Va. Cmty. College v. Katz*, 546 U.S. 356, 363 (2006) (citation and internal quotation marks omitted).

Moreover, what we said in *Convention Ctr. III* was that "*absent express or implied limitation*, the power of the electorate to act by initiative is coextensive with the power of the legislature to adopt legislative measures." 441 A.2d at 897 (italics added); *see also Brizill v. District of Columbia Bd. of Elections & Ethics*, 911 A.2d 1212, 1214 (D.C. 2006) (Voters "*generally* may approve through initiative any law that the Council may enact through legislation.") (italics added). Thus, rather than answer the question that is before us in this case, the quoted statement begs the question whether there is an express or implied limitation on the right to initiative that is relevant here.

understood the CAA's purpose as it carried out its mandate to enact necessary implementing law. Thus, the District urges, even if this case is justiciable, under well-established principles of statutory interpretation, this court should presume that the Council acted in conformity with that purpose when it enacted the Human Rights Act safeguard of the IPA. Therefore, the District maintains, any review of the Council's action "should be highly deferential." The District also stresses that section 752 of the Home Rule Act gave the Council broad "authority to enact any act or resolution with respect to matters involving or relating to elections in the District." D.C. Code § 1-207.52.

IV. Analysis

A. The Human Rights Act Safeguard Is Consistent with the Intent of the CAA.

We begin our analysis with the observation that, although District citizens' right of initiative is "very broad," *Hessey*, 601 A.2d at 12, it can be no broader than the Council intended when it initiated legislation to share *its* direct legislative authority with the electorate. This is an important point, which reflects the fact that the people's right of initiative in the District is quite different from the right of initiative in other jurisdictions.[14] In other jurisdictions, it is the people who, through state

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[14] For this reason, we have previously cautioned against "equating the initiative right here with initiatives under the simpler governmental structures of the states." *Convention Ctr. III*, 441 A.2d at 917.

constitutions, have conferred rights on the legislature, but have reserved general legislative power to themselves as well.[15] By contrast, in the District, through section 303 of the Home Rule Act, Congress gave a broad grant of legislative power *to the Council alone* (subject to specified restrictions set out in Title VI, including Congress's power to disapprove Council legislation). In passing the CAA, the Council had to decide the extent of the legislative power it would share with the people.[16] Thus, to resolve the issue that is before us, the Council's intent when it passed the CAA is paramount.[17] *Cf.*

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[15] *See, e.g., McGee v. Sec'y of State*, 896 A.2d 933, 941 (Me. 2006) ("By section 18 the people, as sovereign, have retaken unto themselves legislative power and that constitutional provision must be liberally construed to facilitate, rather than to handicap, the people's exercise of their sovereign power to legislate.") (citation omitted); *Gallivan v. Walker*, 54 P.3d 1069, 1080 (Utah 2002) ("Article VI, section 1 [of the Utah constitution] is not merely a grant of the right to directly legislate, but reserves and guarantees the initiative power to the people.") (italics omitted).

[16] As this discussion implies, there is no federal constitutional right to initiative. *See Molinari v. Bloomberg*, 564 F.3d 587, 597 (2d Cir. 2009) ("[T]he right to pass legislation through a referendum is a state-created right not guaranteed by the U.S. Constitution."); *Marijuana Policy Project v. United States*, 304 F.3d 82, 87 (D.C. Cir. 2002) (Congress could "repeal the [District's] initiative process altogether").

[17] The task before us is therefore fundamentally different from the task we faced in *District of Columbia v. Wash. Home Ownership Council, Inc.*, 415 A.2d 1349 (D.C. 1980) (en banc), where we recognized that, while the "Council's interpretation of its own authority [under the Home Rule Act, which was passed by Congress, not the Council] obviously commands great respect, . . . [it is not] entitled to weight beyond the inherent persuasiveness of the position taken in a particular instance." *Id.* at 1351 n.5.

Stevenson v. District of Columbia Bd. of Elections & Ethics, 683 A.2d 1371, 1376 (D.C. 1996) (reasoning that ambiguous language in the CAA must be read in a way that expresses the Council's intent and rejecting the "premise that the bill as enacted meant something different from the bill the Council intended").

1. The Human Rights Act Safeguard Is Not Inconsistent with the Relevant Language of the CAA, Which is Ambiguous.

a. The Definition of "Initiative"

The words used in a statute "are the primary, and ordinarily the most reliable, source of interpreting the meaning" of the statute. *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 454–55 (1989); *Brizill*, 911 A.2d at 1216 n.8 ("The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used"). Thus, in our effort to determine the Council's intent, we turn first to the language of the CAA. As already described, the definitional section of the CAA defines the term "initiative" as "the process by which the electors of the District of Columbia may propose laws (except laws appropriating funds) and present such proposed laws directly to the registered qualified electors of the District of Columbia for their approval or disapproval." *Id.* § 1-204.101 (a). This is the language on which appellants focus primarily, arguing that the "except laws appropriating funds"

phrase is "the exclusive substantive limitation" on the right to initiate legislation.

Although on its face this language may appear to denote that there is but one limit on use of the initiative process, the context shows that this is not the case. The Charter amendment that established the right to initiative must be read in conjunction with the Home Rule Act, which, although conferring on the Council broad legislative authority, makes clear that the legislative authority is subject to limits implied by the United States Constitution and to the enumerated limits on that legislative authority that Congress set out in Title VI of the Home Rule Act. *See* D.C. Code §§ 1-203.02, 1-206.02; *Convention Ctr. III*, 441 A.2d at 918 (explaining that voters' power to legislate by initiative can be no broader than the Council's legislative power). Since section 1-204.101 (a) obviously could not and did not remove those limits, it cannot be read as expressing the entire scope of restrictions on the initiative right. Rather, section 1-204.101—which Congress recognized as merely "defin[ing] the operative terms" of the CAA[18]—does not purport to address, and is ambiguous as to, whether there are other limitations on the right to initiative (and referendum).[19] The Human Rights Act safeguard is not inconsistent with that ambiguous language.[20]

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[18] H.R. Rep. No. 95-891, at 15.

[19] Appellants rely on the ballot language that voters saw and approved as indicative of the "plain" meaning of the CAA. We reject this argument. Appellants are correct that the ballot language did not tell voters that the initiative process could be limited. But neither did the ballot language inform voters about the appropriations restriction expressly stated in the

CAA, or about the enumerated limitations on legislative authority set out in Title VI of the Home Rule Act, or about the restrictions implied by the U.S. Constitution. The ballot read:

> The Initiative and Referendum Charter Amendment
>
> Authorizes 5% or more of the city's registered voters (with 5% from each of at least 5 city wards) to propose laws and enact them by public vote or to repeal laws previously enacted by the Council of the District of Columbia by petitioning the Board of Elections and Ethics to conduct a public vote for such purposes. The Board of Elections and Ethics shall place such proposals on the ballot for approval or rejection.
>
> The above would not go into effect until October 1, 1978.

Thus, the ballot asked voters to approve creation of the right to legislate by initiative, but did not ask them to vote as to the scope of the initiative power.

[20] The Superior Court addressed at some length appellants' argument that "[t]he expression of only one subject-matter exclusion, indicates that all other subjects are proper for initiatives." Order Granting District of Columbia's Motion for Summary Judgment and Denying Petitioners' Motion for Summary Judgment, at 6 (Jan. 14, 2010) (hereinafter, "Superior Court Order"). As the court recognized, appellants' argument appears to apply the interpretive canon "*expressio unius est exclusio alterius*." *Id.* at 10. As both the Supreme Court and this court have explained, however, that canon "is an aid to construction, not a rule of law." *Howard Univ. Hosp. v. District of Columbia Dep't of Emp't Servs.*, 952 A.2d 168, 175 (D.C. 2008) (quoting *Neuberger v. Comm'r of Internal Revenue*, 311 U.S. 83, 88 (1940) (internal quotation marks omitted)). More to the point, as the Superior Court explained in its ruling, the canon "depends on identifying a series of two or more terms or things that should be understood to go hand in hand, which

b. The Council's Authority to "adopt acts as are necessary to carry out the purpose" of the CAA

The other relevant language of the CAA is section 1-204.107, the CAA provision that directed

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[is] abridged in circumstances supporting a sensible inference that the term left out must have been meant to be excluded." Superior Court Order at 11 (quoting *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 81 (2002)). Here, the canon does not support appellants' argument. Section 1-204.101 sets out, via the expressed exceptions to the definitions of "initiative" and "referendum," a list of *subject areas* that the Council meant to render off-limits to direct democracy: appropriations, emergency acts, tax levies, the District's budget. No inference can sensibly be drawn that by listing these subject areas and no others, the Council intended that the initiative and referendum process would be otherwise unfettered, i.e. subject to no non-subject-matter safeguards and restrictions. *Cf. Convention Ctr. I*, 399 A.2d at 553 & n.8 (recognizing that, without implementing legislation, the CAA did not "provide sufficient safeguards" against abuse, and relying in part on the Board's statement that "safeguards that modern voters have come to view as essential" were absent from the CAA).

And, quite the contrary, during the Council debate upon the second reading of the CAA, Council Chair Tucker, to expedite a final vote on the legislation, assured Council members that the matter of safeguards (including, as Councilmember Wilson put it, provisions to "protect the citizens against special interests," and possibly, as Councilmember Shackleton thought necessary, referendum expenditure limits) would be addressed and debated in connection with implementing legislation to follow. Final Reading of Bill 2-2, "The Initiative, Referendum, and Recall Charter Amendments of 1977," at 15, 16–19 (May 17, 1977); First Reading of Bill 2-2, "The Initiative, Referendum, and Recall Charter Amendments of 1977," at 37 (May 3, 1977).

the Council to "adopt such acts as are necessary to carry out the purpose of this subpart within 180 days."[21] This language is in marked contrast to the counterpart language used in the bill that Councilmember Hobson introduced on January 3, 1977 (Bill 2-2, which, as amended, became the CAA). Bill 2-2 directed that "[t]he Council of the District of Columbia shall provide the manner in which petitions shall be circulated, presented and certified and measures submitted to the electors." *See* D.C. Council, Comm. on Gov't Operations, Report No. 1 on Bill 2-2 at Attachment A 4 (March 16, 1977) (hereinafter, "CAA Report"). The CAA "necessary to

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[21] Emphasizing this language, appellants cite to cases from other jurisdictions in which courts, construing language directing the legislature to enact legislation to implement initiative or referendum provisions, have ruled that the legislature could impose only procedural rules, not additional substantive restrictions. We do not find these cases helpful, because none of them involved the broad "necessary to carry out the purpose" language used in the CAA. Further, the cases generally involve state constitutional provisions that (unlike the CAA) are self-executing, such that all that is left to the legislature is to specify the form of the referendum or initiative petition, *see, e.g., Loonan v. Woodley*, 882 P.2d 1380, 1386 (Colo. 1994) (applying Colo. Const. art. V, § 1(10)); and, in many jurisdictions, involve provisions that specifically direct the legislature to enact laws to "facilitate . . . operation" of the initiative process and/or specifically provide that "no legislation shall be enacted to restrict the right of initiative." *See, e.g., Cobb v. Burress*, 209 S.W.2d 694, 697 (Ark. 1948) (explaining that because the state constitution provides that "laws may be enacted to facilitate" the right of referendum and further provides that "[n]o legislation shall be enacted to restrict, hamper or impair the exercise of the rights herein reserved to the people," the General Assembly's attempt to limit the time within which a referendum petition might be filed was beyond the power of the legislature and therefore was void).

carry out the purpose" language also is in stark contrast to the language used in the bills that were introduced in Congress (bills that culminated in passage of the Home Rule Act) that would have created a right to initiative and mandated the Board (not the elected Council) to "prescribe such regulations as may be necessary or appropriate (1) with respect to the form, filing, examination, amendment, and certification of initiative petitions, and (2) with respect to the conduct of any election during which any such petition is considered." Hearing on S. 1603 and S. 1626, 92d Cong. 163. Similarly, the CAA language contrasts with the language used in section 303 (c) of the Home Rule Act, which also afforded the Council a model it might have used to declare its authority to enact merely procedural rules governing the initiative and referendum process. *See* D.C. Code § 1-203.03 (c) (2006) ("The Board of Elections and Ethics shall prescribe such rules as are necessary with respect to the distribution and signing of petitions and the holding of elections for ratifying amendments to subchapter IV of this chapter according to the procedures specified in subsection (a) of this section"). By comparison to all of those formulations, the "necessary to carry out the purpose" language that the Council used in section 1-204.107 appears to be purposefully undefined.[22] Notably, in other contexts, virtually identical language has been used

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[22] Indeed, from the language of section 1-204.107, it appears that, rather than resolve the issue of whether to express in the CAA any additional restrictions on the right to initiative and referendum, the Council decided to "evade that point and establish a legislative construction of the [Charter amendment]." *Myers v. United States*, 272 U.S. 52, 113 (1926).

to authorize the adoption not only of procedural rules, but also of substantive requirements. *See, e.g.*, *District of Columbia Ins. Placement Facility v. Washington*, 269 A.2d 45, 48–49 (D.C. 1970) (noting that statute that directed the Superintendent of Insurance to promulgate such regulations as "he shall deem necessary to carry out the purposes" of the statute authorized the Superintendent to direct that insurance placement facilities issue crime insurance).[23] The fact that section 1-204.107 placed no express limit mandating that the CAA-implementing legislation must be procedural only may be taken as "a convincing indication that none [i.e., no such limit] was intended." *Myers*, 272 U.S. at 128.[24] At the very least, section 1-204.107 is

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[23] The "necessary to carry out the purpose" language of section 1-204.107 also is strikingly similar to the "Necessary and Proper" clause of Article I, section 8, cl. 18 of the Constitution, which the Supreme Court has construed as broadening the power of Congress. *See, e.g.*, *United States v. Comstock*, 130 S. Ct. 1949, 1956–59 (2010) (explaining that the "Necessary and Proper" clause grants Congress power to "make all Laws which shall be necessary and proper for carrying into Execution" the enumerated powers vested in Congress, "grants Congress broad authority to enact federal legislation" that goes beyond what is described specifically in the list of enumerated powers); *McCulloch v. Maryland*, 17 U.S. 316, 420 (1819) (concluding that if the "Necessary and Proper" clause "does not enlarge, it cannot be construed to restrain the powers of [C]ongress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government").

[24] Additionally, the fact that in the CAA the Council reserved to itself the task of adopting implementing rules, rather than assign that responsibility to the Board, suggests that the Council contemplated that deciding on the rules "necessary to carry out the purpose" of the CAA could entail a balancing of policy considerations that was more suited to

ambiguous as to whether it authorized the Council to adopt additional restrictions or limitations on use of the initiative process. That being the case, the additional "restriction" that the Council imposed through the Human Rights Act safeguard is not manifestly contrary to the "acts as are necessary to carry out the purpose" language of section 1-204.107.

Focusing more particularly on the word "purpose" in the "necessary to carry out the purpose" clause of section 1-204.107, appellants argue that the sole purpose of the CAA was to establish the right of initiative and referendum and that, by authorizing the Council to enact legislation to carry out that purpose, the CAA must be understood to have authorized the Council to do no more than to adopt rules to facilitate citizens' use of the new power. However, they cite no support for their view that the CAA referred only to this mechanical purpose rather than to the concerns and objectives that motivated the Council to pass the act that became the CAA.[25] We deem it significant that the

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legislative resolution than to administrative decision-making. In commenting on the bill that became the CAA, the Board sought "a general grant of rulemaking authority *to carry out the processes* if approved by the voters." CAA Report, at 3; H.R. Rep. No. 95-890, at 9 (italics added); H.R. Rep. No. 95-891, at 8 (italics added). By contrast, as enacted by the Council, the CAA directs the Council to adopt such acts as are necessary "*to carry out the purpose*" of the CAA. The difference in language is striking. *See also* D.C. Code § 1-1021.02 (2006) (IPA provision that directed the Board to "issue rules and regulations *to effect the provisions of*" the IPA) (italics added).

[25] Our dissenting colleagues refer to the preamble to the CAA as printed in the D.C. Statutes-at-Large ("To amend the Charter of the District of Columbia to provide for the power of

CAA Report refers to the initiative, referendum, and recall processes as "legacies of the Progressive Era in American politics" that are designed "to provide direct and continual accountability of public officials to the electorate." CAA Report, at 2; *see also* H.R. Rep. No. 95-890, at 8 (containing the same explanation).[26] If this is the broad purpose of the CAA, the Council could reasonably have thought, for example, that it was necessary to that purpose—i.e., the purpose of helping to ensure that the Council

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initiative, referendum, and recall," 1978 D.C. Stat. 33) and argue that this resolves "any mystery about the purpose of the CAA." They do not discuss the preamble to the Human Rights Act as printed in the D.C. Statutes-at-Large: "To enact Regulation 73-22, A Regulation Governing Human Rights." D.C. Law 2-38, 1977 D.C. Stat. 461. The discussion *supra* documents that the Council had a much more expansive purpose in mind in enacting the Human Rights Act, including to "underscore the Council's intent that the elimination of discrimination within the District of Columbia should have the highest priority . . . and that the Human Rights Act should therefore be read in harmony with and as supplementing other laws of the District." Human Rights Act Report, at 3. Just as the brief preamble to the Human Rights Act does not disclose this broader purpose, there is no reason to treat the brief preamble to the CAA as disclosing the Council's full purpose.

[26] That this was a purpose that the Council likely had in mind when it passed the CAA also is suggested by the legislative history of the Home Rule Act, in which there were discussions of the initiative, referendum and recall processes as means of assuring that elected officials remained responsive to the electorate. *See, e.g.*, Hearings before the Subcommittee on Government Operations of the Committee on the District of Columbia, 93d Cong. 11 (1978) (statement explaining that there was probably no need for these powers since Council members would be made "additionally responsive" by their then-proposed two-year terms and since there would continue to be "Federal Government oversight" and "the continual restraining effect of the federal presence").

was accountable to the entire electorate—for the Council to disallow use of the initiative or referendum process to enact legislation that would have the effect of discriminating against sectors of the electorate who might need protection from the "major forms of discrimination currently encountered by citizens."[27] Human Rights Law Report, at 1 (describing the target of the Human Rights Law).

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[27] Indeed, such reasoning appears to be implicit in the Council's reference, in the IPA Report, to Justice Douglas's concurrence in *Reitman v. Mulkey*, 387 U.S. 369 (1967). The Committee on Government Operations quoted Justice Douglas's statement (which itself quoted the writings of James Madison) about the need to protect minorities "from acts in which the Government is the mere instrument of the major number of the Constituents." *Id.* at 387 (Douglas, J., concurring) (citation and internal quotation marks omitted). IPA Report, at 11. And, during the Council debate upon the first reading of the IPA, Councilmember Wilson, for one, expressed concern about how "this government [can] make decisions that are in the best interest of a whole" without being "accuse[d] . . . of not wanting to allow people to vote." First Reading of Bill 3-2, "Initiative, Referendum, and Recall Procedures Act of 1979," at 43 (Mar. 13, 1979).

Implicit in our statement that the Council could reasonably have thought that the Human Rights Act safeguard of the IPA was necessary to carry out the purpose of the CAA is the point that, if we could conceive no rational connection between the purpose of the CAA and the Human Rights Act safeguard, we would have a basis for concluding that this provision of the IPA falls outside the authority conferred by the CAA. The same would be true if we concluded that the Human Rights Act safeguard conflicts with the language of the CAA. Thus, we reject the District's argument that the issue presented in this appeal is a nonjusticiable political question for lack of any judicially manageable standard.

That said, we agree with the District that our role is not to second-guess the Council's judgment and to decide whether there is a sufficiently strong connection between the purpose of the CAA and the Human Rights Act safeguard. The "degree of [the safeguard's] necessity, the extent to which [it] conduce[s] to the end, the closeness of the relationship between the means adopted and the end to be attained, [were] matters for [the legislature's] determination alone." *Comstock*, 130 S. Ct. at 1957. To be "necessary to carry out the purpose" of the CAA, it was not required that the Human Rights Act safeguard be absolutely necessary to enable the initiative and referenda processes to be launched.[28] To conclude that the Human Rights Act safeguard is not inconsistent with the CAA, it is enough that we can conclude (as we do) that, on its face, the Human

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[28] *Id.* at 1956 (explaining that in the "Necessary and Proper" Clause, "necessary" does not mean "absolutely necessary"; rather, the clause gave Congress "power to enact laws that are 'convenient, or useful' or 'conducive' to the authority's 'beneficial exercise'"); *accord McCulloch*, 17 U.S. at 413–14 ("'[N]ecessary' frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable."); *id.* at 415 ("The subject [of the "Necessary and Proper" Clause] is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure . . . their beneficial execution. This could not be done, by confiding the choice of means to such narrow limits as not to leave it in the power of [C]ongress to adopt any which might be appropriate, and which were conducive to the end").

Rights Act safeguard is not manifestly contrary to the "purpose" of the CAA.

In short, analysis of the text of the CAA does not enable us to agree with appellants that the Council contravened the express language of the CAA in enacting the Human Rights Act safeguard. And, quite the contrary, other factors persuade us that the Council acted in a manner consistent with its intent when it passed the CAA.

2. The Council's Interpretation of the CAA, Which is Reflected in the IPA Human Rights Act Safeguard, Is Entitled to Substantial Deference.

Although the language of the CAA does not tell us whether the Council intended that the CAA-implementing legislation could set out additional limitations on the right to initiative, what the Council did in enacting the IPA provides an authoritative interpretation of the intent and meaning of the CAA. This follows from the principle that "a contemporaneous legislative exposition of the Constitution [or, by analogy, the Charter Amendments] when the . . . framers . . . were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given [the Constitution's] provisions." *Eldred v. Ashcroft*, 537 U.S. 186, 213 (2003) (quoting *Myers*, 272 U.S. at 175); *see also Printz v. United States*, 521 U.S. 898, 905 (1997) ("[E]arly congressional enactments provide contemporaneous and weighty evidence of the Constitution's meaning[.]") (citations and internal quotation marks omitted). The principle

that the Supreme Court re-affirmed in *Eldred* is squarely applicable here, because the Council that authored and, in April 1978, began consideration of the bill that became the IPA was largely the same Council that passed the CAA in May 1977.[29] We agree with the District that these facts—i.e., the passage of the IPA by Council members who also were the "framers" of the Charter Amendments, and the near-contemporaneity of their work on first the CAA and then the IPA—dictate that we accord substantial deference to the Council's "legislative construction"[30] of the CAA as expressed in the IPA, which was intended to implement the CAA.[31]

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[29] Ten of the thirteen Council members who voted in favor of the CAA were still on the Council when the IPA was passed in March 1979, and all ten voted in favor of enactment; an eleventh, Marion Barry, was still on the Council when the bill that became the IPA was introduced in April 1978, and later, as then-Mayor, signed the IPA into law.

[30] *Myers*, 272 U.S. at 113.

[31] *Cf. Winters v. Ridley*, 596 A.2d 569, 572, 577 (D.C. 1991) (Schwelb, J., concurring) (discussing whether an inmate's "good time credit" accumulated pursuant to the "Good Time Credits Act" ("GTCA") passed in 1986 could be applied to reduce the inmate's mandatory minimum sentence for first-degree murder; observing that ten of the thirteen members of the Council who passed the GTCA were also members of the Council in 1989; and reasoning that the Council's unanimous passage in 1989 of a resolution and legislation declaring that the GTCA was not intended to affect mandatory minimum sentences imposed for first-degree murder was "surely revealing as to what the 1986 Council intended to accomplish" through the GTCA and "provide[d] persuasive evidence of [the Council's] intent in 1986 . . . . [i]n the absence of evidence that the members of the Council were mistaken, or worse, about what they initially intended").

That is not to say that we must accept any provision that the Council enacted as part of the IPA; we have not hesitated to strike down a provision of the IPA where it squarely conflicted with a provision of the CAA. *See Price v. District of Columbia Bd. of Elections & Ethics*, 645 A.2d 594, 596–99 (D.C. 1994) (striking down IPA provision that required the Board to use the November 1989 voter registration roll to calculate the number of signatures required for an initiative or referendum petition where the specific terms of the CAA required use of the December 1993 voter registration roll, because "to the extent any IPA provision is inconsistent with the Charter Amendments, the latter controls"); *see also INS v. Chadha*, 462 U.S. 919, 944 (1983) (explaining that longstanding acceptance will not "save [a practice] if it is contrary to the Constitution"). But where, as here, the relevant CAA provisions admit of more than one meaning, the Council's legislative construction of those provisions when it drafted the IPA less than a year after it passed the CAA is entitled to substantial weight. *Myers*, 272 U.S. at 113, 174–75.[32] Thus, we must begin with a presumption that the Human Rights Act safeguard that the Council

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[32] *See also Winters*, 596 A.2d at 578 (Schwelb, J., concurring) ("The views of a subsequent legislature are not conclusive as to the intent of an earlier one, but they carry 'considerable retrospective weight.'") (quoting *Heckler v. Turner*, 470 U.S. 184, 211 (1985)); *Stevenson*, 683 A.2d at 1376 (observing that "the legislative history both at the time of enactment *and afterwards* . . . points unmistakably to the Council's intent" in enacting the "5 percent" language of the CAA) (italics added).

enacted as part of the IPA is consistent with the CAA.

That there was more than one possible interpretation of the relevant provisions of the CAA was made evident at the outset, when, during the debate on the IPA, both the Corporation Counsel and the General Counsel to the Council advised that the Council did not have the power to impose the Human Rights Act safeguard.[33] But the elected representatives of the people—the Council and the Mayor—thought otherwise. Importantly, it was the Council members, not the lawyers, who were privy to the full panoply of discussions, conferences, and considerations that led to adoption of the CAA, and who had the authority to propose and vote on the IPA. It is their understanding that informs our analysis.[34] An observation by the Supreme Court in

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[33] For example, the Office of Corporation Counsel opined that "[a]ny substantive restrictions on the rights of the voters . . . are contrary to [the CAA] and, hence, are void and of no effect," Supplemental Memorandum from Louis P. Robbins, Principal Deputy Corporation Counsel, Office of the Corporation Counsel to Judith W. Rogers, Special Assistant for Legislation, at 2 (June 2, 1978) (3 Op. C.C.D.C. 102, 103 (1978)); *see also* Memorandum from Edward B. Webb, Jr., General Counsel to Council Members, at 2 (June 7, 1978) (opining that the Human Rights Act safeguard "engrafts . . . a new requirement not in the Charter amendment" and represents "an indirect attempt to further amend the Charter and is, therefore, legally without effect").

[34] And, although a few Council members questioned whether the IPA restriction on referenda dealing with *any* budget item (including capital budget items) comported with the CAA, *see* Second Reading of Bill 3-2, "Initiative, Referendum, and Recall Procedures Act of 1979," Excerpt at 7–10, 15 (Mar. 27, 1979), we see no evidence that any Council

Myers is instructive. The issue before the Court in that case was whether "under the Constitution the President has the exclusive power of removing executive officers of the United States whom he has appointed by and with the advice and consent of the Senate." 272 U.S. at 106. The Court noted that the First Congress had decided the issue—i.e., had "early adopted as the practical construction of the Constitution that this power was vested in the President alone[,]" *id.* at 153—"within two years after the Constitutional Convention and within a much shorter time after its ratification[,]" and while "number[ing] among its leaders those who had been members of the Convention." *Id.* at 136. Regarding the First Congress's decision, the Supreme Court observed that "[i]t was of course to be expected that the decision would be received by lawyers and jurists with something of the same division of opinion as that manifested in Congress, and doubts were often expressed as to its correctness." *Id.* Nevertheless, the Court observed, "the acquiescence which was promptly accorded [the First Congress's interpretation] after a few years was universally recognized." *Id.* "[T]he decision of Congress in 1789 and the universal practice of the Government under it, had settled the question beyond any power of alteration." *Id.* at 146 (quoting *Parsons v. United States*, 167 U.S. 324, 330 (1897)). So, here, the doubts expressed by lawyers who had neither the authority to enact the CAA nor were answerable to

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member thought that the Human Rights Act safeguard contravened the CAA. Thus, we see "no cause to suspect that a purpose to evade" the CAA mandate prompted the Council to adopt the Human Rights Act safeguard. *Eldred*, 537 U.S. at 199–200.

the electorate do not undermine our reliance on the Council's interpretation (as reflected in the IPA) of language in the CAA that can bear more than one meaning.

3. We Accept the Council's Interpretation of the CAA As Reflected in the IPA Because It Is Consistent with the Concerns and Objectives T h at the Council Contemporaneously Emphasized as Having the "Highest Priority."

The District of Columbia Charter is a "constitutional analog." *Wash. Home Ownership Council*, 415 A.2d at 1367 (Gallagher, J., concurring) (internal quotation marks omitted). As the Supreme Court reasoned long ago in *Myers*, in determining ultimately whether to accept the legislature's near-contemporaneous construction of an ambiguous constitutional provision, it is important to understand the context in which the framers did their work and the concerns that animated them.[35]

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[35] The particular facts discussed in *Myers* again are instructive. The opinion recounts that under the Articles of Confederation, the states' union "had not worked well," in part because there was no strong Executive; rather, Congress was given the power of appointing certain executive officers and also exercised the power of removal. *See* 272 U.S. at 110, 116. "The debates in the Constitutional Convention indicated an intention to create a strong Executive" and to specify "many of his important functions . . . so as to avoid the humiliating weakness of the Congress during the Revolution and under the Articles of Confederation." *Id.* at 116–17 (citation omitted). Nevertheless, the Constitution does not specify that the

Accordingly, we look to the context in which the Council passed the CAA (both the original version of the CAA and the revised version that was put to voters in November 1977) and the broader legislative agenda and objectives that motivated Council members at the time.

Almost immediately after passage of the original version of the CAA in May 1977, the Council turned its efforts toward introducing and passing (on July 26, 1977) a bill that re-enacted the Human Rights Law as the Human Rights Act of 1977.[36] As described above, the Council explained that it intended the re-enactment to "forcefully convey to the executive and administrative agencies of the District Government the importance which the Council places on vig[o]rous enforcement of its provisions" and to reinforce and underscore the Council's intent that the District's human rights law be given the "highest priority" and "be read in

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President may act alone to remove officials whose terms are not specified. The First Congress, however, passed laws that rejected its "legislative construction" that the President does have the power of removal of officers appointed with the advice and consent of the Senate. *Id.* at 113, 153. The Court's opinion makes clear that it accepted that legislative construction, by members of the First Congress who were among the framers of the Constitution, because the interpretation was consistent with the concerns and objectives that guided the framers. *Id.* at 115–37, 164 (setting out various statements by members of the First Congress, and concurring in the interpretation that carried the day, because "to hold otherwise would make it impossible for the President, in case of political or other differences with the Senate or Congress," to act as a strong Executive).

[36] The Mayor signed the Human Rights Act into law on September 28, 1977.

harmony with and as supplementing other laws of the District." Human Rights Act Report, at 3. The Council emphasized, *inter alia*, its objective to reinforce the principle that the Human Rights Law was intended as a supplement to every District licensing and benefit scheme—to make it "unequivocally clear, for example, that a licensed establishment which has been found to discriminate in violation of the Act, could have its license suspended, revoked, or otherwise restricted for that reason." *Id.*[37] The Council explained, too, that it was

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[37] Both the Human Rights Law and the Human Rights Act contained language nearly identical to the following current provision of the Act:

> (a) Whenever it appears that the holder of a permit, license, franchise, benefit, or advantage issued by any agency or authority of the government of the District is a person against whom the Office has made a finding of probable cause [that the holder is violating the Human Rights Act] pursuant to § 2-1403.05, the Office, notwithstanding any other action it may take or may have taken under the authority of the provisions of this chapter, may refer to the proper agency or authority the facts and identities of all persons involved in the complaint for such action as such agency or authority, in its judgment, considers appropriate, based upon the facts thus disclosed to it.
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> (b) The Commission, upon a determination of a violation of any of the provisions of this chapter by a holder of, or applicant for any permit, license, franchise, benefit, exemption, or advantage issued by or on behalf of the government of the District of Columbia, and upon failure of the respondent to correct the unlawful discriminatory practice and comply with its order, in accordance with § 2-1403.15 (a), shall refer this determination to the appropriate

taking action in the wake of *Newsweek*, 376 A.2d 777, a decision of this court issued on March 28, 1977, and an earlier decision from 1974,[38] that called into question the District government's powers to enforce some of the remedies provided in the Human Rights Law, which had been promulgated by the pre-Home Rule Council (under its more limited powers) as a regulation rather than a statute. Human Rights Act Report, at 2. During the Council discussion of the bill upon its final reading, Councilmember Barry urged the Council to "go on record as carrying out our progressive tradition in this city of being in the forefront of human rights," and to make the District's human rights law "as broad and as sweeping as we possibly can," to eliminate discrimination "under any guises." Final Reading of

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agency or authority. Such determination shall constitute prima facie evidence that the respondent, with respect to the particular business in which the violation was found, is not operating in the public interest. Such agency or authority shall, upon notification, issue to said holder or applicant an order to show cause why such privileges related to that business should not be revoked, suspended, denied or otherwise restricted.

D.C. Code § 2-1403.17 (a), (b) (2007).

[38] *Mendota Apartments v. District of Columbia Comm'n on Human Rights*, 315 A.2d 832, 833, 834, 835 (D.C. 1974) (upholding Commission on Human Rights order that petitioner cease and desist from racial discrimination in the rental of apartments ("refusing to lease an apartment to [complainant] because she is a Negro"), but concluding that the Commission did not have authority to award damages to compensate complainant for the anguish and humiliation suffered because of petitioner's discriminatory practices, since that was beyond the scope of reasonable and usual police regulations).

Bill 2-179, "The Human Rights Act of 1977," at 75 (July 26, 1977). Councilmember Rolark explained that she co-sponsored the bill because she "kn[e]w how hard that fight has been to obtain human rights in the District of Columbia for all of us and I do underscore 'all.'" *Id.* at 76.

We believe it is reasonable to assume that the Council did not come by these strong views only in June 1977 (when the bill that became the Human Rights Act was introduced), and that Council members held these views as they passed the original version of the CAA the previous month, in May 1977. And, in any event, the Council had forcefully articulated these views before it passed the amended version of the CAA (on November 1, 1977) that was presented to voters. This history and the strong language that the Council used when it re-enacted the District's human rights law (and when it included the Human Rights Act safeguard in the bill that the Council Committee on Government Operations reported to implement the CAA) inform our analysis. In light of them, we find it inconceivable that the Council would have intended to permit individuals to use the initiative process to circumvent the human rights law, which the Council had just affirmed had the "highest priority," Human Rights Act Report, at 3, and which, we have recognized, "was enacted to aid . . . the public at large." *JBG Props., Inc. v. District of Columbia Office of Human Rights*, 364 A.2d 1183, 1185 (D.C. 1976).[39]

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[39] *Cf. Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 552 (1987) ("We agree with the Secretary that [i]t is inconceivable that Congress intended to allow either the State

For this reason, we are persuaded that the Council would have understood the human rights law as "supplementing" the CAA, Human Rights Act Report, at 3, and as an implied limitation on the initiative and referendum prerogative (in a manner similar to the way in which the District's human rights law was and is a limitation implied in the various "permit, license, franchise, benefit, [and] advantage" schemes administered by agencies of the District government. D.C. Code § 2-1403.17 (a)).[40] *See* IPA Report, at 10 ("It is [an] implied restriction to ensure that no initiated measure will establish an affirmative policy in favor of discrimination in this community"). Stated differently, we are persuaded that the Council would have viewed the CAA as permitting citizens to place initiatives and referenda on the ballot only insofar as consistent with the District's human rights law (and that, by broadly describing its mandate to adopt "acts as are necessary to carry out the purpose" of the CAA, the Council left the door open for the IPA to incorporate explicitly that human rights safeguard).[41] "[T]o hold

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of Alaska or Native Alaskans to select [i.e., own] portions of the [Outer Continental Shelf]—a vital national resource reserve held by the [government] for the public.") (citation and internal quotation marks omitted).

[40] *See also Filippo v. Real Estate Comm'n of the District of Columbia*, 223 A.2d 268, 269, 270 (D.C. 1966) (upholding order of Real Estate Commission suspending petitioner's real estate broker's license on ground that he "exhibit[ed] and offer[ed] for sale a house . . . to Negroes at a higher price than the same house was exhibited and offered for sale to white persons[,]" in violation of the police regulations prohibiting, *inter alia*, discrimination for reasons of race).

[41] It may be asked why, then, did the Council not state a human rights restriction in the CAA. We addressed a similar

otherwise" would be to conclude that the Council intended to confer an initiative right that could "make it impossible[,]" *Myers*, 272 U.S. at 164, to achieve the Human Rights Act objectives that the Council emphasized had the highest priority.

Our recognition of this implied Human Rights Act safeguard does not portend a dilution of the important right of the electorate to propose laws. In the thirty-plus years since passage of the IPA, the Council has never attempted to impose any further legislative limitation on the right to initiative or referendum. The fact that it has not done so weighs heavily against the possibility that any further restrictions on the right of initiative are implied in the CAA.[42]

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question in *Atchison*, where the issue was whether the Council's failure to include in the CAA a provision that would have granted the Council the express power to amend or repeal an initiative act meant that the Council had no such power. 585 A.2d at 154. We cited the Supreme Court's observation in *United States v. Wells Fargo Bank*, 485 U.S. 351, 358 (1988), about Congress's failure to include a particular provision in a tax bill: "Equally plausible is that the Committee omitted the express exception as unnecessary." *Atchison*, 585 A.2d at 156.

[42] *Cf. Printz*, 521 U.S. at 907–08 ("[W]e do not think the early statutes imposing obligations on state courts imply a power of Congress to impress the state executive into its service. Indeed, it can be argued that the numerousness of these statutes, contrasted with the utter lack of statutes imposing obligations on the States' executive . . . suggests an assumed absence of such power.") (italics omitted). Similarly, the fact that the Council, acting within (and somewhat beyond) the 180-day legislative period described in the CAA, identified no additional limitations as necessary to carry out the purpose of the CAA, presumably would weigh against a finding that additional types of limitations are necessary.

The legislative history of the IPA reflects that when the Council set about crafting provisions to carry out the purposes of the CAA, it focused on the Supreme Court's opinion in *Reitman*, which the Committee on Government Operations Report discussed in some detail. IPA Report, at 9–11. In *Reitman*, the Supreme Court affirmed a ruling of the Supreme Court of California striking down, as violative of the Equal Protection Clause of the Fourteenth Amendment, Proposition 14, an initiative measure that provided that the state could not abridge the right of any person to sell or decline to sell his property as he or she chooses. 387 U.S. at 370–71. The Supreme Court held that "[t]he California Court could very reasonably conclude" that the result of Proposition 14 was that "[t]he right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter," *id.* at 376–77, and that the initiative measure would "significantly encourage and involve the State in private discriminations." *Id.* at 381.

Having studied *Reitman*, the Council Committee on Government Operations came to the view that for the Board to accept an initiative or referendum that would have the effect of discriminating, would involve the District government in condoning and assisting with discrimination.[43] The Council cited

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[43] Such involvement and complicity, the Council doubtless realized, could not be avoided by a post-election repeal of a discriminatory measure; rather, the involvement of the Board and the expenditure of District funds to put such an initiative on the ballot would constitute the very involvement that the

the language in *Reitman* that "the initiative process may not be used to place the Government in the posture of affirmatively condoning discrimination" and that "when the Government's official position of neutrality toward protected minority classifications (such as those identified in the Human Rights Act of 1977) is removed and a policy of discrimination is imposed, such measures will fail." IPA Report, at 9. Accordingly, the Committee recommended including in the IPA a mandate that the Board not accept any initiative or referendum that would authorize discrimination or have the effect of authorizing discrimination prohibited by the Human Rights Act.[44]

Council believed improper and would be contrary to the fundamental values expressed in the Human Rights Act.

[44] As discussed earlier, the Human Rights Law originated as a police-power regulation, deemed "necessary for the protection of lives, limbs, health, comfort, and quiet of all persons and the protection of all property within the District of Columbia." D.C. Code § 1-303.03 (2006). When the Council included the Human Rights Act safeguard in the IPA, recent events would have afforded the Council good reason to anticipate that an initiative or referendum that would have the effect of authorizing discrimination could be a threat to the peace and to life and limb. It was widely reported in the press that, in 1977, Dade County, Florida had an ordinance that prohibited discrimination on the basis of sexual orientation. Activist Anita Bryant led a prominent campaign to repeal the ordinance, which was successful during the election held on June 7, 1977. The press reported that the campaign provoked violent clashes between proponents and opponents of repeal. *See, e.g.*, "Gay Rights Showdown in Miami," *TIME*, June 13, 1977, http://www.time.com/time/magazine/article/0,9171,918998-2,00.html (last visited July 13, 2010) (noting, *inter alia*, that a campaign worker was hospitalized after a beating). The *Washington Post* reported that the bitter five-month campaign leading up to the vote on the Dade County referendum was

The Council's acceptance of the Committee's recommendation was consistent with the "highest priority" objective that the Council expressed during the same time period when it crafted the CAA. Because the Human Rights Act safeguard is consistent with that objective, we accept the Council's legislative interpretation, reflected in the IPA, that the safeguard implements the intent of the CAA.[45]

B. Section 752 Gave the Council Authority to Direct the Board to Refuse to Accept Initiative and Referendum Measures That Would Authorize or Have the Effect of Authorizing Discrimination.

We further conclude that the Council was not obliged to allow initiatives that would have the effect of authorizing discrimination prohibited by the Human Rights Act to be put to voters, and then to

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"one of the most emotionally charged . . . in recent memory, with near hysteria on both sides of the issue." Mary Russell, "Gay Rights Loses 2-1 in Miami Law," *Washington Post*, June 8, 1977, section A 4, col. 1. An editorial cartoon in the paper captured the atmosphere of violence, depicting supporters of Bryant throwing rocks at supporters of the anti-discrimination ordinance. *Washington Post*, June 10, 1977, section A 26, col. 1.

[45] We note, as Chief Justice Roberts did when he declined to stay the effective date of the Marriage Equality Act, that when the IPA was passed (with the not-easily overlooked Human Rights Act safeguard), the legislation laid over before Congress for thirty legislative days without disapproval by either house. That "Congress . . . chose[] not to act" is "of course not determinative of the legal issues," but does "weigh against appellants' position" that this obviously important and substantive provision of the IPA conflicted with the CAA. *Jackson*, 130 S. Ct. at 1280.

repeal them, or to wait for them to be challenged as having been improper subjects of initiative, should they be approved by voters. Rather, the Council could legislate, as it did through the IPA, that the Board must refuse to accept initiatives and referenda that would authorize prohibited discrimination. We reach this conclusion because the CAA did not provide the Council its exclusive grant of authority to enact laws on matters relating to the initiative and referendum process. Rather, as already described, section 752 of the Home Rule Act conferred on the Council, "[n]otwithstanding any other provision of this [Act] or of any other law, . . . authority to enact *any* act or resolution with respect to matters involving or relating to elections in the District." D.C. Code § 1-207.52 (emphasis added).[46]

As a provision of the Home Rule Act not subject to amendment by the Council or by the voters of the District, section 752 remains one of the provisions

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[46] We are satisfied that initiatives and referenda are "matters involving or relating to elections" within the ordinary meaning of the word "election." Section 412 (b) of the Home Rule Act authorized the Council to call "[a] special *election* . . . by resolution of the Council to present for an advisory *referendum vote* of the people any proposition upon which the Council desires to take action." D.C. Code § 1-204.12 (b) (italics added). The amended Charter specifically refers to a referendum as a "referendum election." D.C. Code § 1-204.102 (b)(1). The D.C. Code provisions relating to initiatives and referenda are set out in Title 1, Chapter 10, Subchapter I of the Code, entitled "Regulation of Elections." In light of these usages, we see no reason not to recognize that the initiative process, like the referendum process, entails an "election." Thus, we conclude that section 752 gave the Council authority to enact laws with respect to the initiative (and referendum) election process.

governing District affairs. *See* D.C. Code § 1-203.03 (a) (providing that only the District Charter as set forth in Title IV of the Home Rule Act is subject to the Charter-amending procedure); D.C. Code § 1-206.02 (providing, per section 602 of the Home Rule Act, that the Council "shall have no authority to pass any act contrary" to the provisions of the Home Rule Act except as specifically provided in the Home Rule Act); and D.C. Code § 1-207.61 (a) (2006) (providing that the provisions of the Home Rule Act "shall prevail and be deemed to supersede" any other laws with which they are in conflict). Moreover, the "[n]otwithstanding any other provision of this Act or of any other law" language of section 752 is "strong stuff" that cannot be assumed to have been superseded by an after-enacted law. *Winters*, 596 A.2d at 573 (Schwelb, J., concurring) (reasoning that "[a] clearer statement [than "notwithstanding any other provision of law"] is difficult to imagine" and that this language "must be read to override any conflicting provision of law in existence at the time" and as "powerful evidence that Congress did not intend any other, more general, legislation, whenever enacted, to qualify the authority . . . set out" in the Act that contains the "notwithstanding" clause) (italics omitted). And, the legislative history of the Home Rule Act suggests strongly that, through section 752, Congress intended to give the Council authority to legislate on substantive matters regarding elections (and not merely to establish procedures).[47]

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[47] Section 752 appears to have originated as section 742 of a House bill, H.R. 9056, 93d Cong. 109–110 (1973), and thereafter was included in a later bill, H.R. 9682, 93d Cong.

At the same time, "a statute generally should be read to give effect, if possible, to every clause," *Heckler v. Chaney*, 470 U.S. 821, 829 (1985) (citation and internal quotation marks omitted), and it is a "basic axiom . . . that courts should construe all legislative enactments to give them some meaning[.]" *Rosado v. Wyman*, 397 U.S. 397, 415 (1970). Adhering to these basic rules of construction, we decline to interpret the Council's authority under section 752 of the Home Rule Act in a way that effectively would mean that the initiative right, conferred through the Charter- amending procedures also set out in the Home Rule Act, could be rendered meaningless, or in a way that would so diminish the initiative right as virtually to nullify it. This "basic

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131 (1973), as section 752. The record of the Senate hearings shows that Congress was urged to leave to the Council "important nitty-gritty questions" such as whether ex-felons would be permitted to vote and whether there could be a durational residency requirement for voting (the constitutionality of which was in question). *See* Hearing on S. 1603 and S. 1626, 92d Cong. 222, 228. Congress was urged to "make only those changes" to the Election Act that were "absolutely necessary to enable the first election to be held," leaving it to the Council or Congress later to make "a thorough revision." *Id.* at 231. The Report of the Committee on the District of Columbia on H.R. 9682 together with Dissenting Views, 93d Cong., 1st Sess. (Sept. 11, 1973) includes a "Dissenting Commentary on Significant Provisions of H.R. 9682." H.R. Rep. 93-482, at 141 (1973). That commentary asserts that section 752 "would permit the local government to exempt all District employees from the Hatch Act, which currently prohibits employees of the Federal and District Governments from taking an active part in political management or in political campaigns." *Id.* at 165 (internal quotation marks omitted).

axiom" articulated in *Rosado* is especially applicable here since the right of initiative is "a right that Congress affirmatively approved." *See Stevenson*, 683 A.2d at 1375 ("[I]t is not without significance that Congress affirmatively approved the Charter Amendments Act after passage by the Council."). Accordingly, we must, if we can, harmonize section 752 and the CAA. We can do so, as follows.

At the time the Home Rule Act was passed, the Election Act mandated that the Board would be an independent agency. Specifically, the Election Act provided (and still provides, *see* D.C. Code § 1-1001.06 (a) (2006)), that "[i]n the performance of its duties, the Board shall not be subject to the direction of any non-judicial officer of the District." D.C. Code § 1-1106 (a) (1973). We interpret section 752 to confer upon the Council the authority to enact laws giving direction to the Board in the handling of election matters, notwithstanding the Board's status as an independent agency.[48] This is what the Council did in imposing the Human Rights Act safeguard of the IPA, by declaring that, consistent with the Council's interpretation of the scope of the right of initiative in the CAA, the Board must refuse to accept initiative measures that it determined would authorize prohibited discrimination. In doing so, the

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[48] As originally proposed in the House Bill (H.R. 9056), section 752 (then numbered as section 742) read "[n]otwithstanding any other provision of this Act or of any other law, the Council shall have *jurisdiction* to legislate with respect to matters involving or relating to elections in the District" (italics added). H.R. 9056, 93d Cong. 109–110. This language supports a reading that a focus of section 752 was the Council's authority vis-a-vis the independent Board.

Council explicitly relied on its authority under section 752. *See* IPA Report, at 11 ("Further legal support for the provisions of the enabling legislation here presented are found in [section 752], which grant[s] the Council plenary authority over all election matters."). Under section 752—and despite what one court has called the "general rule favoring postelection review" of the validity of a proposed initiative measure[49]—the Council had authority to require the Board to conduct pre-election review of whether the subject matter of a proposed initiative is a proper subject matter. *See Convention Ctr. III*, 441 A.2d at 914 (concluding that the IPA mandate that the Board exclude from the ballot a referendum measure that would negate a budget-request act "comports with the Charter Amendment limitations on the initiative right [and that] the reliance of the Board . . . on that provision was entirely proper").[50]

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[49] *Legislature v. Deukmejian*, 669 P.2d 17, 20 (Cal. 1983) (per curiam).

[50] Appellants have not contended that the resultant prior subject-matter restraint on initiative measures implicates the First Amendment right to free speech, and relevant persuasive authority is to the contrary. "The First Amendment imposes no restriction on the withdrawal of subject matters from the initiative process." *Marijuana Policy Project*, 304 F.3d at 84–85 (holding that, by complying with the so-called Barr Amendment (through which Congress banned the District from making any expenditures to reduce penalties associated with marijuana) in rejecting a proposed initiative that would reduce marijuana penalties, the Board did not violate the First Amendment, because "although the First Amendment protects public debate about legislation, it confers no right to legislate on a particular subject.") (citing *Skrzypczak v. Kauger*, 92 F.3d 1050 (10th Cir. 1996)) (holding that state supreme court decision removing an abortion initiative from the ballot did not violate a voter's First Amendment rights because the voter remained free "to argue

The Board's decision, as has been made evident by this and many other cases, is subject to prompt judicial review.

For all the foregoing reasons, we are unpersuaded by appellants' contention that the Council either overstepped its authority or acted in contravention of the CAA when it imposed the Human Rights Act safeguard of the IPA.[51]

C. The Proposed Initiative Would Authorize or Have the Effect of Authorizing Discrimination Prohibited by the Human Rights Act.

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against legalized abortion, to contend that pre-submission content review of initiative petitions is unconstitutional, or to speak publicly on any other issue"), *overruled on other grounds by Initiative & Referendum Inst. v. Walker*, 450 F.3d 1085, 1099 (10th Cir. 2006) (en banc) ("Although the First Amendment protects political speech incident to an initiative campaign, it does not protect the right to make law, by initiative or otherwise."). There is "no law . . . establishing a right to have a particular proposition on the ballot." *Skrzypczak*, 92 F.3d at 1053.

[51] One final point: There is no doubt that, through the Human Rights Act and the Human Rights Act safeguard, the Council has sought to promote a broad policy of non-discrimination that will preclude voters from putting some measures on the ballot. To the extent that citizens disagree with this fundamental policy, they are not without a remedy. The Council "is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position." *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541–42 (2001) (citation and internal quotation marks omitted).

Appellants further contend that even if the Human Rights Act safeguard is valid, their proposed "Marriage Initiative of 2009" does not run afoul of the restriction. They assert that this court's decision in *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995), establishes "conclusively" that the Human Rights Act "does not reach the marital relationship."

The Board urges us to uphold its determination, arguing in its brief that the proposed initiative (providing that "[o]nly marriage between a man and a woman is valid or recognized in the District of Columbia") would render not only JAMA but also the Marriage Equality Act "null and void and would consequently strip all same sex married couples of their attendant rights and responsibilities of marriage in the District of Columbia" based solely on the "gender and/or sexual orientation of the spouses. In its November 17, 2009 Memorandum Opinion and Order, the Board distinguished *Dean* and reasoned as follows:

> While neither the HRA [i.e., the Human Rights Act] nor its legislative history explicitly mentions same-sex marriage, it is without question that the HRA must "be read broadly to eliminate the many proscribed forms of discrimination in the District." Since JAMA's enactment, the District recognizes same-sex marriages that have been properly entered into, performed, and recognized by other jurisdictions. This did not exist when *Dean* was decided. Consequently, couples who fall within JAMA's purview are entitled to the same

> benefits of marriage that are afforded heterosexual married couples, and the denial of these benefits to married couples on the basis of the sexual orientation of the individuals who comprise the couples now constitutes a "proscribed form of discrimination." It is clear that this result is the intent of the Council, which voted 12-1 to pass JAMA. The Initiative seeks to deny recognition to JAMA marriages on the basis of the sexual orientation of the individuals who comprise the couples. As a result, the Board finds, and both the District's Attorney General and General Counsel for the Council agree, that the Initiative authorizes or would authorize discrimination proscribed by the HRA and is therefore not a proper subject for initiative.

Id. at 11.

We agree with the Board's interpretation of *Dean*, its view that the Human Rights Act analysis in *Dean* has limited continuing significance, and its conclusion that the proposed initiative would have the effect of authorizing discrimination on the basis of sexual orientation.[52] In *Dean*, a panel of this court

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[52] Although the Board's brief argues that the proposed initiative would authorize or have the effect of authorizing discrimination on the basis of "gender and/or sexual orientation," the Board's decision was that the initiative would authorize discrimination prohibited by the Human Rights Act in that it would "deny recognition to . . . marriages on the basis of the sexual orientation of the individuals who comprise the

considered a claim by a same-sex couple that, "by refusing to issue them a marriage license, the Clerk [of the Superior Court acting through the Marriage License Bureau] discriminated against them because of their sex or sexual orientation, in violation of the Human Rights Act, D.C. Code §§ 1-2501 to -2557 (1992)." 653 A.2d at 318. Before reaching this issue, the court set out a lengthy discussion of the language and legislative history of the District's marriage statute, which, the *Dean* court concluded, "demonstrate that neither Congress nor the Council of the District of Columbia has ever intended to define 'marriage' to include same-sex unions." *Id.* at 310. The *Dean* opinion noted that the only significant changes in the District's marriage and divorce provisions since 1901 had occurred in the Marriage and Divorce Act of 1977, D.C. Law 1-107, 1977 D.C. Stat. 114. *Id.* at 311. On the path to enacting that legislation, which "merely amended existing code provisions," *Id.* at 312, the Council had declined to act favorably on a bill introduced by Councilmember Dixon that would have permitted marriages between persons of the same sex. *Id.* at 311. The court saw no "indication that more recent Congresses, or the Council in amending the marriage statute, ever modified the fundamental legislative understanding that 'marriage' is limited to opposite-sex couples. *Id.* at 314. Rather, the court concluded, there was a "consistent legislative understanding and intent that 'marriage' means—and thus is limited to—unions between persons of opposite sexes." *Id.* at 315. This "statutory

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couples." Accordingly, our analysis focuses only on the correctness of that ruling.

understanding [was] further confirmed by the ordinary sense and meaning traditionally attributed to the word 'marriage'" in dictionary definitions. *Id.* The court could not "conclude that any legislature for the District of Columbia that has addressed the marriage statute has ever intended to authorize same-sex unions." *Id.* ("[C]ases from other jurisdictions with marriage statutes similar to the District's . . . have uniformly interpreted ['marriage,' by definition, as requiring two members of opposite sexes").

Turning to the Human Rights Act claim, the *Dean* court noted that the version of the Human Rights Act in effect at the time made it "an unlawful discriminatory practice" for one to "deny, directly or indirectly, any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodations," if the denial is "wholly or partially for a discriminatory reason based on the . . . sex . . . [or] sexual orientation . . . of any individual." *Id.* at 318–19. The court acknowledged the appellants' argument that "when the Marriage License Bureau, a place of public accommodation under the Clerk of the Superior Court, refuses to issue marriage licenses to same-sex couples, gays and lesbians are unlawfully denied an 'equal opportunity' to participate in marriage, an important 'aspect of life.'" *Id.* at 318. The court assumed, "without formally deciding," that the Marriage License Bureau is a "place of public accommodation" (in which discrimination was specifically prohibited

under the Human Rights Act). *Id.* at 319.[53] The court further acknowledged that "[t]he Council undoubtedly intended the Human Rights Act to be a powerful, flexible, and far-reaching prohibition against discrimination of many kinds, including sex and sexual orientation." *Id.* The court reasoned, however, that the Council "did not intend the Act to prohibit every discriminatory practice," *id.*, and went on to hold:

> [W]e cannot conclude that the Council ever intended to change the ordinary meaning of the word "marriage" simply by enacting the Human Rights Act. Had the Council intended to effect such a major definitional change, counter to common understanding, we would expect some mention of it in the Human Rights Act or at least in its legislative history . . . . There is none . . . . [A]s we have seen—"marriage" requires persons of opposite sexes; there cannot be

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[53] The court noted that the Human Rights Act defined a "place of public accommodation" to include "establishments dealing with goods or services of any kind," as well as "public halls." It noted the position of *amicus* Human Rights Commissioners that "all District of Columbia agencies are places of public accommodation, within the meaning of the Human Rights Act, because they provide goods and services to District residents." *Id.*; *cf. Ptaszynski v. Uwaneme*, 853 A.2d 288, 297 (N.J. App. Div. 2004) (holding that "any State governmental agency is a place of public accommodation" for purposes of the definition of "place of public accommodation" in the New Jersey Law Against Discrimination, N.J. Stat. § 10:5-5 (l)); *see also Thomas v. Cnty. of Camden*, 902 A.2d 327, 332 (N.J. App. Div. 2006) ("[P]ublic entities . . ., by their very nature, constitute a place of public accommodation").

> discrimination against a same-sex marriage if, by independent statutory definition extended to the Human Rights Act, there can be no such thing.

Id. at 320.

While the *Dean* court unambiguously concluded that the Marriage Bureau's implementation of the District's longstanding marriage statutes, and the definition of marriage reflected therein, did not amount to discrimination prohibited by the Human Rights Act, there is no dispute that the landscape has changed dramatically. Through JAMA and the Marriage Equality Act, the Council has both acknowledged and endorsed an expanded definition of marriage to include same-sex unions. As the briefs inform us, several other jurisdictions, too, currently authorize same-sex marriage. The question now is whether an initiative measure that would deny recognition to individuals who have entered or wish to enter into same-sex marriages in the District or elsewhere, and would deprive them of the benefits and obligations that come along with such recognition, would authorize or have the effect of authorizing discrimination on a basis prohibited by the Human Rights Act. We have no difficulty concluding that the proposed initiative would do so.[54]

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[54] In 2002, the pertinent provision of the Human Rights Act was amended to read as follows:

> Except as otherwise provided for by District law or when otherwise lawfully and reasonably permitted, it shall be an unlawful discriminatory practice for a District government agency or office to limit or refuse

The proposed initiative would require District government agencies and offices that provide or administer an array of services, programs, and benefits otherwise available to married persons, to deny certain of those services, programs, or benefits to individuals who are partners to a same-sex rather than opposite-sex union.[55] The initiative thus would take away from those individuals a civil right that the Council has seen fit to recognize and expressly allow, and its effect would be to authorize discrimination on the basis of sexual orientation.

> to provide any facility, service, program, or benefit to any individual on the basis of an individual's actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, disability, matriculation, political affiliation, source of income, or place of residence or business.

D.C. Code § 2-1402.73 (2006) (italics added). This amendment is fairly regarded as a clarification. As discussed, in 1977 the Home Rule Council re-enacted without substantive change the Human Rights Law, regarding which the pre-Home Rule Council said that it was "a priority . . . that District government will be the first to comply" with the "spirit" of the law, such as by addressing complaints of discrimination against police officers. Human Rights Law Report, at 2. In Executive Order 94-132 (May 19, 1994), then-Mayor Sharon Pratt Kelly summarized the interpretation that enjoyed acquiescence: that "Offices and agencies of the District government are covered by the prohibitions of the Human Rights Act . . . . No . . . agency of the District government may engage in any prohibited activity, including denial of full and equal enjoyment of its services, facilities, privileges or advantages to any person in violation of the Human Rights Act." *See also* note 53 *supra*.

[55] The Board's brief refers to the "more than 200 District rights and responsibilities of civil marriage."

Although, theoretically, it is possible that heterosexuals of the same gender would enter into a same-sex marriage, there can be no dispute that the impact of District agencies' refusal to recognize same sex-marriage would fall most heavily on gay and lesbian residents,[56] denying them the ability to participate fully in an important aspect of life in the District.

We must address, however, the question of whether the Human Rights Act safeguard of the IPA required the Board to evaluate a proposed initiative under the Human Rights Act of 1977—the legislation specified in the IPA—rather than under the version of the Human Rights Act at the time of the Board's determination. As the District's brief acknowledges, under general rules of statutory construction, a statute that specifically refers to another statute "incorporates the provisions referred to . . . as of the time of adoption without subsequent amendments, *unless the legislature has expressly or by strong implication shown its intention to*

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[56] *See Estenos v. PAHO/WHO-Fed. Credit Union*, 952 A.2d 878, 887 (D.C. 2008) (explaining that under the Human Rights Act, "'despite the absence of any intention to discriminate, practices are unlawful if they bear disproportionately on a protected class and are not independently justified for some nondiscriminatory reason'") (quoting *Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 29 (D.C. 1987) (en banc) ("[T]he Council imported into the Human Rights Act, by way of the effects clause, the concept of disparate impact discrimination[.]" (further citation omitted)); *cf. Loving v. Virginia*, 388 U.S. 1, 2, 8 (1967) (rejecting the argument that because a statute prohibiting interracial marriage applied equally to black and white citizens, it did not discriminate on the basis of race).

incorporate subsequent amendments." 2B Norman J. Singer, *Sutherland Statutes and Statutory Construction* § 51.08 (7th ed. 2008) (italics added). We are satisfied that the italicized exception rather than that general rule, is applicable here. The legislative history of the IPA guides our interpretation. As reported by the Committee on Government Operations, Bill 2-317 prohibited initiatives that discriminated "by reason of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, matriculation, political affiliation, physical handicap, source of income, and place of residence or business." Memorandum from Louis P. Robbins, Principal Deputy Corporation Counsel, to Judith W. Rogers, Special Assistant for Legislation, regarding Supplemental comments on Bill 2-317, the "Initiative, Referendum, and Recall Procedures Act of 1978," at 1 (June 2, 1978) (quoting Amendment to § 212 of Bill No. 2-317). As explained to members of the Committee in a memorandum from the Legislative Assistant to the Chairman, the amendment to the bill when it was re-introduced as Bill 3-2, stating that "the Board of Elections [and] Ethics cannot accept any petitions which authorize discrimination prohibited under the Human Rights Act of 1977," was "merely a technical change, whereby the language [that] prohibits specific discriminatory types of petitions has been deleted . . . . The effect is synonymous with that of Bill 2-317 [which contained the list of proscribed categories of discrimination, including sexual orientation]." Memorandum from Deborah K. Green, Legislative Assistant to the Chairman, to the Committee on Government Operations, on Bill 3-2, the "Initiative

Referendum and Recall Procedures Act of 1979," February 6, 1979, at 2.

In light of that documentation, we regard the IPA's reference to the Human Rights Act of 1977 as a shorthand indication that the Council meant to require the Board to perform its gatekeeper function by determining whether a proposed initiative would authorize discrimination of the type currently prohibited by the District's human rights law, not by looking only to that law as it existed in 1977. We see no evidence that the Council "intended by such specific reference[] [to the Human Rights Act of 1977 and to its D.C. Code citation] any limitation on subsequent amendments which ameliorated the remedial scheme." *EEOC v. Chrysler Corp.*, 546 F. Supp. 54, 74 (E.D. Mich. 1982). Moreover, in enacting the Human Rights Act, the Council re-enacted prior law (the Human Rights Law) that explicitly was intended to "provide a regulation of sufficient scope and flexibility to be responsive to future needs for the protection of civil and human rights," since "there may be contexts and reasons for discrimination tomorrow that we do not anticipate today." Human Rights Law Report, at 2. We believe it would contravene the legislative intent to require the Board to apply a dated version of the Human Rights Act that may not be, as the pre-Home Rule Council described and as the Home Rule Council implicitly echoed, adequate to answer the "future needs and circumstances of modern life." *Id.*

V. Conclusion

The Council acted within its authority under the CAA and the Home Rule Act in enacting the Human Rights safeguard of the IPA and in directing the Board not to accept initiatives that contravene that safeguard. Because appellants' proposed initiative would authorize, or have the effect of authorizing, discrimination on a basis prohibited by the Human Rights Act, it was not a proper subject of initiative. Therefore, the Board acted lawfully in refusing to accept the initiative on that basis. Accordingly, the judgment of the Superior Court upholding the Board's determination is

Affirmed.

FISHER, *Associate Judge*, with whom WASHINGTON, *Chief Judge*, and GLICKMAN and OBERLY, *Associate Judges*, join, dissenting: This appeal is about legislative authority – that vested in the Council of the District of Columbia and that granted to the voters at large. In 1978, five years after the Home Rule Act transformed governance in the District of Columbia, the Council, the voters, and the Congress of the United States, acting in collaboration, amended the District Charter (Title IV of the Home Rule Act) for the first time, creating the right of initiative so that the voters themselves could propose and approve legislation.[1]

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[1] An initiative is "the process by which the electors of the District of Columbia may propose laws (except laws appropriating funds) and present such proposed laws directly to the registered qualified electors of the District of Columbia for their approval or disapproval." D.C. Code § 1-204.101 (a) (2006). If a majority of those voting approves an initiative, it becomes law, assuming (as is also true for an act of the Council)

The following year, the Council enacted implementing legislation known as the Initiative, Referendum and Recall Procedures Act of 1979 (the "IPA"). In addition to establishing procedures for submitting, processing, and voting on an initiative petition, the IPA placed a limit on the subject matter that could be addressed by an initiative. The Council instructed the Board of Elections and Ethics not to accept a measure if it "authorizes, or would have the effect of authorizing, discrimination prohibited under" the District of Columbia Human Rights Act. This subject matter limitation on the right of initiative is not found in the Charter, which created that right, or in the more comprehensive Home Rule Act, which places certain limits on the legislative power of the District.

In 2009, appellants[2] proposed that the voters exercise their right of initiative and declare that "[o]nly marriage between a man and a woman is valid or recognized in the District of Columbia." The Board refused to accept the measure, holding that the proposal was not a "proper subject of initiative" because it would authorize, or have the effect of authorizing, discrimination prohibited by the Human Rights Act. This court must decide, as a matter of first impression, whether the IPA's

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that it is not disapproved during a mandatory period of Congressional review. D.C. Code § 1-204.105 (2006).

[2] Appellants, the proponents of the Marriage Initiative of 2009, are Bishop Harry Jackson, Jr., Reverend Walter Fauntroy, Reverend Dale Wafer, Melvin Dupree, Apostle James Silver, Reverend Anthony Evans, Robert King, and Elder Howard Butler.

"Human Rights Act limitation" is a valid restriction on the right of initiative. For the reasons which follow, we would hold that it is not.

Had our view prevailed, we would not have reached the question whether the Board properly refused to accept the proposed initiative. In light of the majority's holding, however, and in light of recent legislation recognizing and authorizing same-sex marriages in the District of Columbia, we agree with the majority's conclusion that the proposed initiative would authorize, or have the effect of authorizing, discrimination prohibited by the Human Rights Act, as amended in 2002.

I. The Factual and Procedural Background

On two occasions (in 2009 and 2010), appellant Jackson and others presented referendum[3] petitions to the Board, seeking to suspend two acts of the Council relating to same-sex marriage, but their efforts were unsuccessful. The Board rejected the proposed referenda, citing the Human Rights Act ("HRA"), litigation ensued, and the acts became law.[4]

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[3] "The term 'referendum' means the process by which the registered qualified electors of the District of Columbia may suspend acts of the Council of the District of Columbia (except emergency acts, acts levying taxes, or acts appropriating funds for the general operation budget) until such acts have been presented to the registered qualified electors of the District of Columbia for their approval or rejection." D.C. Code § 1-204.101 (b) (2006).

[4] The Superior Court, this court, and Chief Justice Roberts, sitting as Circuit Justice, declined to stay the effective date of the Religious Freedom and Civil Marriage Equality

"No act is subject to referendum if it has become law according to the provisions of § 1-204.04 [after a period of congressional review]." D.C. Code § 1-204.102 (b)(2) (2006).

The Jury and Marriage Amendment Act of 2009, which became law on July 7, 2009, provides that the District of Columbia will recognize "[a] marriage legally entered into in another jurisdiction between 2 persons of the same sex . . . ." D.C. Code § 46-405.01 (2010 Supp.). On March 3, 2010, the Religious Freedom and Civil Marriage Equality Amendment Act of 2009 became law. It allows couples of the same sex to marry in the District of Columbia. D.C. Code § 46-401 (2010 Supp.).

Meanwhile, on September 1, 2009, appellants submitted the Marriage Initiative of 2009. The Board refused to accept the initiative, reasoning that, "[i]f passed, [it] would, in contravention of the HRA, strip same-sex couples of the rights and responsibilities of marriages currently recognized in the District. . . . Because the Initiative would authorize discrimination prohibited by the HRA, it is not a proper subject for initiative, and may not be accepted by the Board." Appellants petitioned for review by the Superior Court, and for a writ of mandamus. The trial court allowed the District of Columbia to intervene and later granted summary

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Amendment Act of 2009. *See Jackson v. District of Columbia Board of Elections and Ethics*, 130 S. Ct. 1279 (2010).

judgment to the Board and the District. This appeal followed.[5]

II. The "Constitutional" Framework

The Constitution of the United States of America vests in Congress the power to legislate for the District of Columbia "in all Cases whatsoever." U.S. CONST. art. I, § 8, cl. 17. However, in 1973 Congress enacted the District of Columbia Self Government and Governmental Reorganization Act, Pub. L. 93-198, 87 Stat. 777 (1973) (codified at D.C. Code §§ 1-201.01–1-207.71), popularly known as the Home Rule Act. Through this transforming legislation, Congress delegated some, but not all, of its legislative power over this jurisdiction to the Council of the District of Columbia while retaining ultimate legislative authority over the District. *See* D.C. Code §§ 1-204.04, 1-206.01; *see also District of Columbia v. Greater Washington Central Labor Council, AFL-CIO*, 442 A.2d 110, 113-14 (D.C. 1982) (discussing Congress's delegation of legislative power). Congress intended, among other things, to "grant to the inhabitants of the District of Columbia powers of local self- government . . . and, to the greatest extent possible, consistent with the constitutional mandate, relieve Congress of the burden of legislating upon

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[5] Although the acts 5 of the Council related to same-sex marriage have become law, this appeal is not moot. We have held that the right of initiative may be used to repeal or amend existing legislation. *Convention Center Referendum Committee v. District of Columbia Board of Elections and Ethics*, 441 A.2d 889, 909 & n.38 (D.C. 1981) (en banc) (*Convention Center III*).

essentially local District matters." D.C. Code § 1-201.02 (2006).

Nevertheless, the Home Rule Act contains several limitations on the legislative power of the District.[6] For example, the Council has no authority to "[i]mpose any tax on property of the United States," to enact a "commuter tax" on the income of persons who do not reside in the District, to alter the organization and jurisdiction of the District of Columbia courts, or to "amend or repeal any Act of Congress . . . which is not restricted in its application exclusively in or to the District[.]" D.C. Code § 1-206.02 (a)(1), (3), (5), (8) (2006); *see also* D.C. Code § 1-206.03 (restrictions related to the budget process).

The Home Rule Act is now found in Chapter 2 of Title 1 of the D.C. Code, and Subchapter IV of Chapter 2, the District Charter, "establish[es] the means of governance of the District . . . ." D.C. Code

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[6] *See* D.C. Code § 1-203.02 (entitled "Legislative power"), which states:

> Except as provided in §§ 1-206.01 to 1-206.03, the legislative power of the District shall extend to all rightful subjects of legislation within the District consistent with the Constitution of the United States and the provisions of this chapter subject to all the restrictions and limitations imposed upon the states by the 10th section of the 1st article of the Constitution of the United States.

Article I, Section 10, of the Constitution forbids the states to do a variety of things, including entering into treaties, coining money, granting a title of nobility, or, without the consent of Congress, laying any duty of tonnage.

§ 1-203.01. As we have noted, see *supra* note 6, legislation passed by the Council (or by initiative) must be "consistent with the Constitution of the United States and the provisions of this chapter [the Home Rule Act] . . . ." D.C. Code § 1-203.02. The Home Rule Act and the District Charter thus serve as a constitution for the District. *See Convention Center III*, 441 A.2d at 903 (plurality opinion) (legislation enacted by the Council must "be consistent with the U.S. Constitution and the Home Rule Act"); *id.* at 930 (dissenting opinion) ("it is beyond serious dispute that legislation may not amend a constitution (the Charter)"); *District of Columbia v. Washington Home Ownership Council, Inc.*, 415 A.2d 1349, 1367 (D.C. 1980) (en banc) (concurring opinion) (referring to the Home Rule Act as "the 'constitutional' analog").

The Home Rule Act includes a process for amending the Charter which requires collaboration among the Council, the voters of the District of Columbia, and Congress. With certain exceptions not relevant here, the Charter "may be amended by an act passed by the Council and ratified by a majority of the registered qualified electors of the District voting in the referendum held for such ratification." D.C. Code § 1-203.03 (a). At the time of the Charter Amendments Act, on which we will focus here, the Home Rule Act required that Congress "adopt a concurrent resolution . . . approving such amendment" before it would become effective. D.C. Code § 1-125 (b) (1977 Supp.). Now, an amendment to the Charter takes effect unless Congress, during a period of congressional review,

enacts a joint resolution disapproving the amendment. D.C. Code § 1-203.03 (b).

III. The Right of Initiative and Its Limits

The rights of initiative, referendum, and recall were added to our form of government in 1978 by the Charter Amendments Act ("CAA") and thereby became part of the District's Charter. D.C. Law 2-46, 24 D.C. Reg. 199 (1977) (as approved by H. R. Con. Res. 464 & 471, 95th Cong. (1978)) (codified at D.C. Code § 1-204.101-107 (initiative and referendum) and D.C. Code § 1-204.111-115 (recall)). These Charter Amendments are "functionally equivalent" to constitutional amendments, *Convention Center Referendum Committee v. Board of Elections and Ethics*, 399 A.2d 550, 551 (D.C. 1979) (*Convention Center I*), and they may not be changed by ordinary legislation. "We are required to construe the right of initiative liberally . . . and may impose on the right 'only those limitations expressed in the law or "clear[ly] and compelling[ly]" implied.'" *Hessey v. Burden*, 584 A.2d 1, 3 (D.C. 1990) (*Hessey I*) (quoting *Convention Center III*, 441 A.2d at 913).

As amended, the Charter includes one express limitation on the subject matter of an initiative[7] – the voters may not propose "laws appropriating funds."[8] Other express limitations are found

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[7] Demonstrating that it thought carefully about the need for express limitations when drafting the Charter Amendments Act, the Council placed three express limitations on the right of referendum. See *supra* note 3.

[8] The parties agree that this case does not implicate this express limitation on the right of initiative.

elsewhere in the Home Rule Act; as we have already mentioned, the legislative power of the District (whether exercised by the electors directly or by the Council) does not extend to certain enumerated subjects. Some limitations are implicit – "[t]he initiative right must conform to the structure of government established by Congress in the Charter." *Hessey v. District of Columbia Board of Elections and Ethics*, 601 A.2d 3, 19 (D.C. 1991) (*Hessey II*). Importantly, all of these limitations, whether express or implied, are found in the Charter or the Home Rule Act.

IV. The Human Rights Act

In 1973, the District of Columbia Council (the predecessor of the current Council of the District of Columbia) adopted Title 34 of the District of Columbia Rules and Regulations, known as the "Human Rights Law" (34 DCRR § 3.1). "In enacting Title 34, the City Council looked beyond the Civil Rights Act of 1964, including Title VII, to other civil rights legislation enacted by Congress more than 100 years ago [referring to an 1866 law now codified, as amended, at 42 U.S.C. §§ 1981 and 1982.]" *Arthur Young & Co. v. Sutherland*, 631 A.2d 354, 371 (D.C. 1993). Title 34 also drew upon a rich history of local legislation, police regulations, and Commissioners' Orders dating back to 1869 that prohibited various types of discrimination in the District of Columbia.[9]

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[9] *See, e.g., District of Columbia v. John R. Thompson Co.*, 346 U.S. 100 (1953) (involving 1872 and 1873 acts of the Legislative Assembly of the District of Columbia which, among other things, prohibited racial discrimination by restaurant keepers and hotel proprietors); *Newsweek Magazine v. District of Columbia Commission on Human Rights*, 376 A.2d 777, 783

Concerned that the police power regulations in Title 34 might not have the same force and effect as a statute, the (post Home Rule) Council of the District of Columbia re-enacted the regulations as The Human Rights Act of 1977. *Blodgett v. University Club*, 930 A.2d 210, 217 (D.C. 2007). The first section of the Human Rights Act explains that the legislature intended "to secure an end in the District of Columbia to discrimination for any reason other than that of individual merit . . . ." The substantive provisions which existed in 1977 prohibited discrimination in public accommodations, employment, educational institutions, and housing and commercial space based upon many characteristics, including sex and sexual orientation.

"In amending the [Human Rights Act] in 1997, the legislature emphasized its 'broad scope' and the fact that its coverage is wider than Title VII:

(D.C. 1977) (noting that Title 34 repealed and replaced Article 40 (Concerning Admission to, and Accommodation in, Licensed Places of Public Amusement in the District of Columbia), Article 45 (Prohibiting Discrimination by Reason of Race, Color, Religion or National Origin Against Persons Seeking or Utilizing Housing Units), and Article 47 (Prohibiting Discrimination by Reason of Race, Color, Religion, National Origin or Sex Against Persons Seeking or Engaged in Employment in the District of Columbia) of the Police Regulations of the District of Columbia); *Filippo v. Real Estate Commission of the District of Columbia*, 223 A.2d 268 (D.C. 1966) (affirming order which suspended license of real estate broker who violated fair housing regulations found in Article 45 of the Police Regulations); *Central Amusement Co. v. District of Columbia*, 121 A.2d 865 (D.C. 1956) (prosecution for violating 1869 police regulation, then still in effect, which prohibited racial discrimination in places of public amusement).

> The District's human rights law has long been praised for its broad scope. The law bans discrimination in employment, housing, public accommodations, and education. It protects people from discrimination based on characteristics covered in federal civil rights law – race, color, sex, religion, age, national origin, and disability – as well as other characteristics not covered under federal law, such as sexual orientation, marital status, and family responsibilities."

Lively v. Flexible Packaging Ass'n, 830 A.2d 874, 887 (D.C. 2003) (en banc) (quoting D.C. Council, Committee on Government Operations, Report on Bill 12-34, "The Human Rights Amendment Act of 1997," at 2 (May 29, 1997)).

We have described the Human Rights Act as "a powerful, flexible, and far-reaching prohibition against discrimination of many kinds," *Executive Sandwich Shoppe, Inc. v. Carr Realty Corp.*, 749 A.2d 724, 732 (D.C. 2000) (citation and internal quotation marks omitted), and its reach has expanded significantly since 1977.[10] "Among the

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[10] The Human Rights Act was extended to cover government services in 2002. Human Rights Amendment Act of 2002, D.C. Law 14-189 § 2 (g) (Act 14-399), 49 D.C. Reg. 6523 (2002) (codified at D.C. Code § 2-1402.73 (2007)). Since 1977, several protected categories, including "gender identity or expression" and "familial status," have been added. *Compare* D.C. Code § 2-1401.01 (2007) *with* D.C. Code § 6-2201 (1978 Supp.). Councilmember Alexander has recently introduced a bill to amend the Human Rights Act "to protect victims and family members of victims of domestic violence, sexual abuse, and stalking against discrimination by employers." Bill 18-

statute's basic purposes is reinforcement of the Council's view that the Human Rights Act is among our most important laws and is to be vigorously enforced by all agencies and officials of the District Government. . . ." *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*, 536 A.2d 1, 33 (D.C. 1987) (en banc) (internal quotation marks and citation omitted). Nevertheless, by contrast to the Charter, the Human Rights Act is not part of our local "constitution." The Council may amend the Human Rights Act by ordinary legislation, and frequently has done so. See *supra* note 10.

In light of this community's longstanding commitment to securing an end to discrimination, it is entirely understandable that citizen groups and the Council would recognize the possibility that "a proposed initiative measure [might seek to] authorize discrimination as a policy for this community." D.C. Council, Report on Bill 2-317 at 11 (May 3, 1978). These concerns emerged when the Council turned to the task of implementing the newly created rights of initiative, referendum, and recall.

V. The Initiative, Referendum and Recall Procedures Act of 1979

The Charter Amendments Act did not prescribe how the newly-created rights of initiative, referendum, and recall were to be implemented.

0796, proposing the "Protecting Victims of Crime Amendment Act of 2010."

Instead, Section 8 of Amendment No. 1 (which established the rights of initiative and referendum) instructed:

> The Council of the District of Columbia shall adopt such acts as are necessary to carry out the purpose of this Amendment within one hundred and eighty (180) days of the effective date of this Amendment. Neither a petition initiating an initiative nor a referendum may be presented to the District of Columbia Board of Elections and Ethics prior to October 1, 1978.

D.C. Law 2-46, Amendment No. 1 § 8, 1978 D.C. Statutes-at-Large 33, 34-35 (1978 Comp.) (the codified statute, D.C. Code § 1-204.107, uses the term "subpart" in place of "Amendment"). The outcome of this appeal depends mainly on how we construe this portion of Amendment No. 1.

A. Creating Time to Implement the CAA

The District of Columbia asserts that "[d]eciding what acts are 'necessary to carry out' the undefined 'purpose' of the CAA requires policy decisions that are properly left to the Council and that this Court cannot make without expressing lack of the respect due coordinate branches of government." We disagree.

We focused on these same provisions in *Convention Center I*, where this court held that the Charter Amendments were not self-executing. After quoting or describing various excerpts from the

legislative history, we characterized Section 8 as a "legislative mandate," 399 A.2d at 553, for the Council to pass "enabling legislation," *id.* at 551, 552, "implementing legislation," *id.* at 553, or "implementing acts." *Id.* "[T]he drafters chose the October 1 date on the assumption that the necessary preparations for administering an initiative election – the passage of implementing legislation and the allocation of monies to the Board – would be completed." 399 A.2d at 553. If the Council acted, as directed, within 180 days, the implementing steps would be completed before the Amendment took effect on October 1.[11] Notably, Section 8 of Amendment No. 1 does not purport to enlarge the Council's authority; it does not contain any additional delegation of Congressional power.

The majority points to models of other language that might have been used if the Council were expected "to enact merely procedural rules governing the initiative and referendum process." (Judge Thompson's opinion at 24) A similar point should be made about the majority's comparison of Section 8's language to the "necessary and proper" clause of

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[11] The House Report accompanying the concurrent resolution which approved the CAA explained: "*Section 8* requires the Council to adopt appropriate implementing acts, and makes October 1, 1978, the effective date of this Council Act." H.R. Rep. No. 95-890, at 5 (1978). The attached report from the Council of the District of Columbia similarly states that Section 8 "directs the Council to adopt any further acts which may be necessary to implement the Amendment and prohibits the submission of any initiative or referendum petitions to the Board until after October 1, 1978." *Id.* at 17.

Article I, Section 8, Clause 18 of the Constitution.[12] That model might have been used *if* the Council, the voters, *and the Congress* intended that Section 8 enhance the power of the Council. The fact that the word "necessary" appears in both places does not make this an apt comparison.

Moreover, any mystery about the purpose of the CAA evaporates when Section 8 of Amendment No. 1 is considered in context, as it should be. *See District of Columbia v. Beretta, U.S.A., Corp.*, 872 A.2d 633, 652 (D.C. 2005) (en banc) ("[W]e do not read statutory words in isolation; the language of surrounding and related paragraphs may be instrumental to understanding them."). Rather than being "undefined," and perhaps indiscernible, as the District suggests, the "purpose" of the CAA was "[t]o amend the Charter of the District of Columbia to provide for the power of initiative, referendum, and recall." D.C. Law 2-46, Preamble, 1978 D.C. Statutes-at-Large 33 (1978 Comp.). The CAA contained two amendments to the District Charter, each of which had a distinct purpose. Charter Amendment No. 1 – now codified as Subpart 1 – establishes the rights of initiative and referendum. The codified version of Section 8 of Amendment No. 1 (D.C. Code § 1-204.107) instructs the Council to "adopt such acts as are necessary to carry out the purpose of this subpart [Amendment] within 180

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[12] Article I, Section 8, Clause 18 provides: "The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

days of the effective date of this subpart." Charter Amendment No. 2 – Subpart 2 as codified – establishes the right of recall. A corresponding provision, D.C. Code §1-204.115, instructs the Council to "adopt such acts as are necessary to carry out the purpose of this subpart . . . ."

Considered in context, this "necessary to carry out the purpose" language was a mandate to enact implementing legislation – to adopt such acts as are necessary to make the rights of initiative, referendum, and recall available to the people of the District of Columbia – and to do so in a timely manner. It did not grant any license to restrict those rights, which had been established through the painstaking process of amending the Charter.

B. Limiting Subject Matter

The implementing legislation arrived (albeit beyond the 180-day period allotted) in the form of the Initiative, Referendum and Recall Procedures Act of 1979. This legislation, among other things, prescribed the form in which a measure must be submitted and the number of copies required, and established timetables and procedures for processing it. D.C. Code § 1-1001.16.[13] The Board must reject a

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[13] For example, the supporters of an initiative "shall file with the Board 5 printed or typewritten copies of the full text of the measure, a summary statement of not more than 100 words, and a short title of the [proposed initiative] . . . ." D.C. Code § 1-1001.16 (a)(1). If the Board accepts the initiative or referendum measure, "[w]ithin 20 calendar days, of [such acceptance]," it must, among other things, "[p]repare, in the proper legislative form, the proposed [measure]." D.C. Code § 1-

petition that is not in the proper form. D.C. Code § 1-1001.16 (b)(1)(B). Moreover, "the Board shall refuse to accept the measure if the Board finds that it is not a proper subject of initiative . . . under the terms of title IV of the District of Columbia Home Rule Act [the District Charter] . . . ." D.C. Code § 1-1001.16 (b)(1). These were genuine implementing steps. But the Council went further and inserted a restriction on the subject matter an initiative could address – a limitation not found in the Charter or in the Home Rule Act.

Reacting to understandable concerns that the rights of initiative and referendum could be misused by the majority to discriminate against minorities, the Council instructed the Board (in the IPA) to refuse to accept a measure if it "authorizes, or would have the effect of authorizing, discrimination prohibited under Chapter 14 of Title 2 [the Human Rights Act.]" D.C. Code § 1-1001.16 (b)(1)(C). But the legitimacy of this concern does not mean that the Council had the authority to restrict a right established in the Charter. In light of the current litigation, it is striking that, while the IPA was under consideration, both the Corporation Counsel and the legislature's own General Counsel warned that the Council did not have the power to impose

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1001.16 (c)(3). "After preparation, the Board shall adopt the summary statement, short title, and legislative form at a public meeting and shall within 5 days, notify the proposer of the measure of the exact language. In addition, the Board, within 5 days of adoption, shall submit the [same information] to the District of Columbia Register for publication." D.C. Code § 1-1001.16(d).

this limitation on the right of initiative. The Office of Corporation Counsel explained, for example, that

> [t]he merits of the policy embodied by this restriction on the voters' rights is beside the point. Any substantive restrictions on the rights of the voters granted by Charter Amendment No. 1 are contrary to that Amendment and, hence, are void and of no effect. Such legislation may only be accomplished by the Charter Amending Procedure or by Act of Congress.

Supplemental Memorandum from Louis P. Robbins, Principal Deputy Corporation Counsel, Office of the Corporation Counsel, to Judith W. Rogers, Special Assistant for Legislation, 2 (June 2, 1978); 3 Op. C.C.D.C. 102, 103 (1978).[14]

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[14] Both the Office of Corporation Counsel and the General Counsel of the Council of the District of Columbia issued cautionary advice on more than one occasion while the IPA was under consideration. For example, commenting in the spring of 1978, Corporation Counsel stated: "Additional restrictions in the subjects subject to initiative which are not in the Charter Amendment could not be made pursuant to an act of the Council, but only through the Charter Amendment procedure." Memorandum from Louis P. Robbins, Principal Deputy Corporation Counsel, to Judith W. Rogers, Special Assistant for Legislation, 6 ¶ 2 (May 2, 1978); 3 Op. C.C.D.C. 60, 65 (1978). The General Counsel stated that in contrast to all the other limitations on the right of initiative, which were "procedural in quality" and provided for a "ministerial review process . . . consistent with the function of an implementing act[,]" the antidiscrimination provision "engrafts . . . a new requirement not in the Charter amendment . . . ." Memorandum from Edward B. Webb, Jr., General Counsel, to Council Members, 2 (June 7, 1978) (attaching the supplemental memorandum from

The majority brushes aside these "doubts expressed by lawyers," emphasizing that "the elected representatives of the people – the Council and the Mayor – thought otherwise." (Majority Opinion at 31, 32) But this is a question of legal or "constitutional" authority, not a matter of political judgment.

> We perceive no principled basis for deferring to the Council's interpretation of the Home Rule Act, apart from the merits of the Council's argument. Although "the interpretation of its powers by any branch is due great respect from the others [,] . . . '[i]t is emphatically the province and duty of the judicial department to say what the law is.'" *United States v. Nixon*, 418 U.S. 683, 703 . . . (1974) (quoting *Marbury v. Madison*, 1 Cranch 137, 177 . . . (1803)).

District of Columbia v. Washington Home Ownership Council, Inc., 415 A.2d at 1351 n.5.

The Corporation Counsel gave sound advice in 1978. The rights of initiative, referendum, and recall had become part of the Charter, which cannot be amended except by Act of Congress or by going through the Charter Amendment process. The "necessary to carry out" language in the Charter Amendments Act did not give the Council power to

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Corporation Counsel). The General Counsel opined that "[c]learly, this is an indirect attempt to further amend the Charter and is, therefore, legally without effect." *Id.*

enact legislation inconsistent with the Charter Amendments. *Price v. District of Columbia Board of Elections and Ethics*, 645 A.2d 594, 598-99 (D.C. 1994) (citing *Convention Center III*, 441 A.2d at 915). "[L]egislation implementing the Charter Amendments is valid only if it does not conflict with the Charter Amendments." *Id.* "Nor could the Council amend the Charter Amendments by enacting the IPA since, as the Self-Government Act clearly provides, the Charter may be amended only as provided in D.C. Code § 1- 205(a) (1992) [now codified as D.C. Code § 1-203.03 (a) (2001)]." *Price*, 645 A.2d at 599.

VI. Appellees' Arguments

A. Should We Abstain?

Invoking the Supreme Court's decision in *Baker v. Carr*, 369 U.S. 186 (1962), the District urges us to abstain from deciding this case. It argues, among other things, that the Council's inclusion of anti-discrimination provisions in the Initiative, Referendum and Recall Procedures Act of 1979 has "functioned successfully" over the past decades and now forms part of a statutory scheme upon which the government and the public rely. This argument surely overstates the case. Although the Human Rights Act limitation on the right of initiative has existed for more than thirty years, this is the first

challenge to its validity.[15] More importantly, *Baker* makes plain that "[t]he courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority[,]" 369 U.S. at 217, which is precisely what is at issue here.

By conducting this review of the Council's action, we are not, as the District of Columbia asserts, expressing a lack of the respect due a coordinate branch of government. To the contrary, we proceed cautiously, recognizing "the need to 'balance deference to the legislative authority of the Council, with our own duty to oversee Council action which might exceed congressionally delegated authority.'" *Atchison v. District of Columbia*, 585 A.2d 150, 156 (D.C. 1991) (quoting *American Federation of Government Employees v. Barry*, 459 A.2d 1045, 1050 (D.C. 1983)).

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[15] In *Hessey III* we held that a proposed initiative would not violate the HRA. *Hessey v. Burden*, 615 A.2d 562, 579 (D.C. 1992) (*Hessey III*). Apparently none of the parties challenged the validity of the HRA limitation on the right of initiative. In *Committee for Voluntary Prayer v. Wimberly*, 704 A.2d 1199 (D.C. 1997), opponents of a voluntary prayer initiative argued that it violated the HRA as well as the constitution. We did not consider whether the initiative violated the HRA because we affirmed the trial court's holding that the initiative was "patently, obviously, and unquestionably unconstitutional." *Id.* at 1201, 1203. More importantly, there is no indication that either party challenged the validity of the HRA limitation. "When instances which actually involve the question are rare, or have not in fact occurred, the weight of the mere presence of acts on the statute book for a considerable time, as showing general acquiescence in the legislative assertion of a questioned power, is minimized." *Myers v. United States*, 272 U.S. 52, 171 (1926).

We frequently have had to decide the scope of the Council's authority under the Home Rule Act. *Compare Washington Home*, 415 A.2d 1349 (Council had no authority to pass another substantially identical emergency act in response to same emergency) *with United States v. Alston*, 580 A.2d 587 (D.C. 1990) (after period of congressional review was doubled for certain types of legislation, Council had authority to pass successive, substantially identical emergency acts to preserve the status quo while identical legislation enacted by the Council after two readings was pending before Congress for review); *see also Umana v. Swidler & Berlin, Chartered*, 669 A.2d 717, 724 n.15 (D.C. 1995) (Home Rule Act does not "limit the Council's authority to enact or to alter the substantive law to be applied by the courts"); *Capitol Hill Restoration Society, Inc. v. Moore*, 410 A.2d 184 (D.C. 1979) (Council's grant of appellate court jurisdiction in certain noncontested cases impermissibly altered this court's jurisdiction.). Furthermore, we have often considered the proper scope of the right of initiative, and we have rejected an "argument that adoption of the initiative right by the Council, Mayor, and electorate violated the District's Charter." *Stevenson v. District of Columbia Board of Elections and Ethics*, 683 A.2d 1371, 1375 (D.C. 1996). We also have addressed the validity of a separate portion of the IPA. *See Price*, 645 A.2d at 600 (concluding that a portion of the IPA conflicted with the Charter Amendments). The District does not satisfactorily explain why this case is so different that we must, or even may, abstain from deciding it.

B. Unique Insight?

The District also points out that most of the same Councilmembers who passed the Charter Amendments Act approved the Initiative, Referendum and Recall Procedures Act of 1979. It argues that, "although the second Council could not change the Charter through ordinary legislation, its unique insight into what the CAA meant gave its interpretation through the IPA presumptive validity." However, the cases on which the District relies do not support this proposition. Moreover, we have seen no indication that the Councilmembers who enacted the IPA (thereby imposing the Human Rights Act limitation on the right of initiative) thought they were interpreting the CAA or purported to rely on insiders' knowledge of its purpose. Nor did they profess unique understanding of what the "necessary to carry out" language meant.

The District and the majority focus single-mindedly on the supposed intent of the Council in drafting and "interpreting" the CAA. See, *e.g.*, *ante* at 29 ("what the Council did in enacting the IPA provides an authoritative interpretation of the intent and meaning of the CAA"). Tellingly, however, they point to no evidence that the voters of the District or members of Congress (all indispensable partners in amending the Charter) thought they were delegating to the Council an undefined power to limit the right of initiative in any way the Council thought necessary.[16]

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[16]"Since amendments to the Charter required Congressional approval when the initiative right was approved

The District misplaces its reliance on *Eldred v. Ashcroft*, 537 U.S. 186 (2003), where the Supreme Court noted that it "has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given [the Constitution's] provisions." *Id.* at 213 (quoting *Myers v. United States*, 272 U.S. 52, 175 (1926)). This case is not comparable to *Eldred*, where the Court relied upon "Congress' unbroken practice since the founding generation . . . ." 537 U.S. at 213-14. "History reveal[ed] an unbroken congressional practice of granting to authors of works with existing copyrights the benefit of term extensions so that all under copyright protection will be governed evenhandedly under the same regime." *Id.* at 200. The Court explained: "Such consistent congressional practice is entitled to very great weight, and when it is remembered that the rights thus established have not been disputed during a period of [over two] centur[ies], it is almost conclusive." *Id.* at 213 (internal quotations and citation omitted).

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by Congress, D.C. Code § 1-1320 (1991 Repl.), the court must consider Congressional intent in approving the amendment. Because the Charter amendment is in the form of an act passed by the Council, and because the Charter Amendment on the right of initiative included authority for the Council to adopt implementing legislation, the court must address the intent of the Council." *Hessey II*, 601 A.2d at 7.

By contrast to *Eldred*, the provision at issue here has been in existence for about thirty years (as opposed to over two hundred). More importantly, the District has not pointed us to, nor can we find, any "routine application" or "consistent legislative practice" that has been followed by the Council or approved by the voters or Congress.[17] The most that can be said is that the Human Rights Act limitation has gone unchallenged for more than thirty years. The *Myers* decision, on which *Eldred* relied, makes clear that the legislature may not unilaterally determine the extent of its authority:

> In the use of Congressional legislation to support or change a particular construction of the Constitution by acquiescence, its weight for the purpose must depend not only upon the nature of the question, but also upon the attitude of the executive and judicial branches of the Government, as well

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[17] No inference of approval may fairly be drawn from the failure of Congress to disapprove the IPA, which contained the Human Rights Act limitation on the right of initiative. *See Springer v. Government of the Phillipine Islands*, 277 U.S. 189, 209 (1928) ("The inference of an approval by Congress from its mere failure to act at best rests upon a weak foundation. And we think, where the inference is sought to be applied, as here, to a case where the legislation is clearly void as in contravention of the Organic Act, it cannot reasonably be indulged."); *Clayton v. People of the Territory of Utah*, 132 U.S. 632, 642 (1890) ("At all events, it can hardly be admitted, as a general proposition, that, under the power of congress reserved in the organic acts of the territories to annul the acts of their legislatures, the absence of any action by congress is to be construed to be a recognition of the power of the legislature to pass laws in conflict with the act of congress under which they were created."). *But see* majority opinion at note 45.

> as upon the number of instances in the execution of the law in which opportunity for objection in the courts or elsewhere is afforded. When instances which actually involve the question are rare, or have not in fact occurred, the weight of the mere presence of acts on the statute book for a considerable time, as showing general acquiescence . . ., is minimized.

272 U.S. at 170-71. It was a crucial factor in *Myers* that "the decision of the First Congress on a question of primary importance in the organization of the government . . . was soon accepted as a final decision of the question by all branches of the government." *Id.* at 136. Nothing comparable has happened here, and we therefore are not persuaded by the District's argument relying on *Eldred* and *Myers*.

C. The Council's Rationale

When one focuses on the subject matter restriction imposed by the IPA, an obvious question arises: Why didn't the Council simply add the Human Rights Act limitation to its draft of the Charter Amendments Act?[18] No satisfactory answer has emerged from the legislative history of the CAA. However, the history of the IPA strongly suggests

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[18] The Council approved the original version of the Charter Amendments Act before it passed the Human Rights Act. The Mayor signed the Human Rights Act on September 28, 1977. 24 D.C. Reg. 6038 (Jan. 27, 1978). However, the Council amended the Charter Amendments Act four weeks later, before it was presented to the voters on November 8, 1977. H.R. Rep. No. 95-890, at 2.

that the "Human Rights Act limitation" was an afterthought, a concern brought to the Council's attention after the Charter had been amended. D.C. Council, Report on Bill No. 2-317 at 5 (May 3, 1978) ("Subsequent to the public hearing [on the IPA], the Committee staff received myriad telephone calls in support of an amendment to the enabling legislation which would restrict consideration of initiative measures which foster discrimination. Such an amendment was adopted by the Committee in reporting this measure."). When imposing this limitation on subject matter, the members of the Council did not suggest that the CAA had empowered them to do so. Rather, they invoked authority outside the CAA – the Supreme Court's decision in *Reitman v. Mulkey*, 387 U.S. 369 (1967), and the Council's own statutory authority over elections. D.C. Council, Report on Bill No. 2-317 at 11 (May 3, 1978). Neither rationale gave the Council authority to amend the Charter.

1. *Reitman v. Mulkey*

Reitman considered a provision of the California Constitution that had been initiated by the voters, but the Supreme Court's holding is no more a check on the right of initiative than it is on acts passed by a legislature. So far as the decision discloses, it was irrelevant that the provision was adopted by initiative.

According to the California Supreme Court, that initiative (Proposition 14) was designed "to overturn state laws that bore on the right of private sellers and lessors to discriminate" and "to forestall future

state action that might circumscribe this right." 387 U.S. at 374. When enacted, it became Art. I, § 26, of the California Constitution,[19] but the state Supreme Court held that it "was invalid as denying the equal protection of the laws guaranteed by the Fourteenth Amendment." *Id.* at 373. Affirming, the Supreme Court of the United States accepted the California court's conclusion "that § 26 would and did have wider impact than a mere repeal of existing statutes. . . . The right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government." *Id.* at 376-77. "The California Supreme Court believes that the section will significantly encourage and involve the State in private discriminations[,]" and the Supreme Court of the United States concluded that it had "been presented with no persuasive considerations indicating that these judgments should be overturned." *Id.* at 381.

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[19] Art. I, § 26, provided:

> Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

387 U.S. at 371. The real property covered by § 26 was limited to residential property. *Id.* The section did not apply to state-owned real estate. *Id.*

Of especial interest here, the Supreme Court of California had rejected an effort to keep the proposition off the ballot, reasoning "that it would be more appropriate to pass on those questions after the election . . . than to interfere with the power of the people to propose laws and amendments to the Constitution and to adopt or reject the same at the polls." *Mulkey v. Reitman*, 413 P.2d 825, 829 (Cal. 1966) (quoting the court's previous order). Moreover, the provision was struck down because it violated the federal Constitution, not because it was deemed inconsistent with a state law. *Reitman* clearly does not stand for the proposition that one act of the Council (here, the IPA) can place another act of the Council (even one prohibiting discrimination) off-limits to the initiative process.

2. Section 752

The Council also invoked, and appellees now rely upon, D.C. Code § 1-207.52 (2006) ("Section 752" of the Home Rule Act), which grants the Council "authority to enact any act or resolution with respect to matters involving or relating to elections in the District." We emphasize, however, what we have said before – "nothing in Section 752 . . . grants the Council authority to amend the Charter . . . ." *Price*, 645 A.2d at 599.

At the time Section 752 was enacted, the right of initiative did not exist. It therefore is far from clear that Congress would have thought that the phrase "matters involving or relating to elections in the

District" encompassed initiatives. More fundamentally, given that Section 752 predates by five years the creation of the right of initiative, it is implausible that Congress intended Section 752 to confer upon the Council power to exclude whole subject areas from consideration by the electorate.

In any event, if Section 752 is as broad as appellees assert, why was the Charter Amendments Act necessary? Why didn't the Council simply use its power over elections to create the rights of initiative, referendum, and recall? One obvious answer is that, even if an initiative is an election, it is much more – it is an exercise of legislative power. The Charter provided that "the legislative power granted to the District by [the Home Rule Act] is vested in and shall be exercised by the Council in accordance with this chapter." D.C. Code § 1-204.04. Allowing the voters to exercise legislative power amounted to a further delegation of Congress's authority. Creating that right thus required a Charter Amendment.

If a Charter amendment was necessary to create the right of initiative, an amendment is equally necessary to limit that right. *See Price*, 645 A.2d at 599. And by restricting the subject matter which an initiative may address, the Human Rights Act limitation unmistakably alters (and reduces) the right of initiative. The Council's authority relating to elections, found in Section 752, did not (and cannot)

authorize a restriction amounting to an amendment of the Charter.[20]

Finally, appellees have offered no satisfactory answer to the following question: If the Council's powers are as broad as they assert, what is to preclude the Council from imposing additional subject matter limitations on the right of initiative or, indeed, from extinguishing that right altogether? It appears that a candid answer to that question would be "nothing." Yet, under our "constitutional" principles, a Charter right may not be limited or extinguished by ordinary legislation. That may be done only by going through the intentionally-cumbersome process of amending the Charter.

D. Inappropriate for Direct Democracy?

The District also argues that it is a mistake to read the CAA literally, as establishing a right of initiative "coextensive" with the legislative power of the Council except for one express limitation – "laws appropriating funds." It asserts that "the most reasonable conclusion is that the CAA was intended to authorize the electorate to vote on topics generally, but not those inappropriate for direct democracy." We have found no support whatsoever

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[20] If the logic of the majority's argument were followed, one wonders if the Council, using its power under Section 752, could instruct the Board of Elections to refuse to accept petitions from certain classes of candidates running for election to the Council – even though they met the qualifications for holding office established in the District Charter?

for this proposition in the CAA's text or its legislative history.

Although the District concludes that the "Human Rights Act limitation" was wisely imposed, "consistently with our fundamental political traditions[,]" it offers little guidance on how one determines which topics are "inappropriate for direct democracy." If this is to be the standard, it is impossible to predict how large this newly hypothesized exception to the right of initiative may grow in the future.

Even if we assume that the people at large are more likely to discriminate against minorities than are their elected representatives, appellees forget that there are numerous checks and balances in place here to protect against the tyranny of the majority. Appellants' proposal may be defeated at the polls. If the initiative passes, Congress may disapprove it. *See* D.C. Code § 1-204.105 (2006). Moreover, the Council will have the opportunity to amend or repeal the measure if it becomes law. *See Atchison v. District of Columbia*, 585 A.2d at 155 ("[T]he plenary legislative power given the Council includes the authority to repeal existing legislation, whether or not derived from an initiative."). And the courts will strike down any measure that is unconstitutional. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). In short, in the District of Columbia, the right of initiative is not an example of unchecked democracy. It exists, rather, in conjunction with a republican form of government based on the principle of separation of powers.

* * *

It should be clear that no one on this court doubts the importance of the Human Rights Act. Non-discrimination, tolerance, acceptance, and inclusion are all fundamental values to be fostered in a pluralistic society. But these aspirations are best achieved through a system of laws, and it is vital that the institutions of the District government observe the limits placed upon them by the Home Rule Act and the Charter. It is "our . . . duty to oversee Council action which might exceed congressionally delegated authority.'" *Atchison*, 585 A.2d at 156. The Council of the District of Columbia exceeded its authority when it imposed the "Human Rights Act limitation" on the right of initiative. We respectfully dissent.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

HARRY R. JACKSON, JR., *et al.*	)	
Petitioners,	)	
v.	)	**Civil Action No. 2009 CA 008613 B**
DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS,	)	**Judge Judith N. Macaluso**
Respondent,	)	**Calendar 9**
and	)	
DISTRICT OF COLUMBIA,	)	
Intervenor.	)	

ORDER GRANTING DISTRICT OF COLUMBIA'S MOTION FOR SUMMARY JUDGMENT AND DENYING PETITIONERS' MOTION FOR SUMMARY JUDGMENT

Before the court are two motions for early disposition of this matter. On November 20, 2009, Harry R. Jackson, Jr., Robert King, Walter E. Fauntroy, James Silver, Anthony Evans, Dale E. Wafer, Melvin Dupree, and Howard Butler filed "Petitioners' Motion for Summary Judgment." On December 18, Respondent District of Columbia Board of Elections and Ethics ("the Board") filed an

opposition. Also on December 18, Intervenor the District of Columbia ("the District") filed "District of Columbia's Motion to Dismiss or, in the Alternative, for Summary Judgment." On January 4, 2010, Petitioners filed a combined response to the District's motion and Board's opposition.[1] Argument ensued on January 6, 2010. For the reasons discussed below, the District's motion for summary judgment is granted, and the Petitioners' is denied.

FACTUAL AND PROCEDURAL BACKGROUND

On May 5, 2009, the District of Columbia City Council ("Council") passed the "Jury and Marriage

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[1] Participating as *amicus curiae* in support of Petitioners is a group comprised of The American Center for Law and Justice, United States Senators James Inhofe and Roger Wicker, and United States Representatives Robert Aderholt, Todd Akin, Michele Bachmann, Gresham Barrett, Roscoe Bartlett, Marsha Blackburn, John Boehner, John Boozman, Eric Cantor, Jason Chaffetz, John Fleming, Randy Forbes, Virginia Foxx, Scott Garrett, Phil Gingrey, Louie Gohmert, Jeb Hensarling, Wally Herger, Walter Jones, Jim Jordan, Steve King, Jack Kingston, John Kline, Doug Lamborn, Robert Latta, Don Manzullo, Michael McCaul, Thaddeus McCotter, Patrick McHenry, Cathy McMorris Rogers, Jeff Miller, Jerry Moran, Randy Neugebauer, Mike Pence, Joe Pitts, Mark Souder, and Todd Tiahrt in support of Petitioners.

Participating as *amicus curiae* in support of the Board and the District is a group comprised of Trevor S. Blake, II, Jeff Krehely, Amy Hinze-Pifer, Rebecca Hinze-Pifer, Thomas F. Metzger, Vincent N. Micone, III, Reginald Stanley, Rocky Galloway, DC Clergy United, and Campaign for All D.C. Families. Their filing of January 6, 2010, will be referred to as "Mem. of *Amicus* Blake *et al.*"

Amendment Act of 2009" ("JAMA"). This statute amended the consanguinity provisions of D.C. Code §§ 46-401 (1)-(2) (2005) to make the provisions gender neutral. The act also added § 46-405.01 to recognize same-sex marriages that are valid in the place where the marriage was solemnized.

On May 27, 2009, a petition was filed with the District of Columbia Board of Elections and Ethics ("Board") for approval of a referendum on whether the District should recognize same-sex marriages from other jurisdictions.[2] After holding a public hearing and receiving comments, the Board refused to accept the measure because it would contravene the District of Columbia Human Rights Act, D.C. Code § 2-1401.01 *et seq.* ("Human Rights Act"). The Board stated:

> [The referendum] would . . . strip same-sex couples of the rights and responsibilities of marriage that they were afforded by virtue of

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[2] The proposed referendum read as follows:

> The D.C. Council approved "The Jury and Marriage Amendment Act of 2009." The Act would recognize as valid a marriage legally entered into in another jurisdiction and between 2 persons of the same-sex. The "Referendum Concerning the Jury and Marriage Amendment Act of 2009)" will allow voters of the District of Columbia the opportunity to decide whether the District of Columbia will recognize as valid a marriage legally entered into in another jurisdiction between 2 persons of the same-sex. A "No" vote on the referendum will continue the current law of recognizing only marriage between persons of the opposite sex.

> entering into valid marriages elsewhere, and that the Council intends to clearly make available to them here in the District, simply on the basis of their sexual orientation.

See Jackson v. District of Columbia Bd. of Elections & Ethics, 113 Daily Wash. L. Rptr. 2473 (D.C. Super. Ct. June 30, 2009) ("*Jackson I*") (Retchin, J.).

Petitioners then filed a petition in the District of Columbia Superior Court seeking a writ in the nature of mandamus to compel the Board to accept the proposed referendum. *See* D.C. Code § 1001.16 (b)(3) (2001). The court denied the petition. *Jackson I*. In support of its decision, the court concluded that *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995), which holds that the Human Rights Act is inapplicable to marriage, is no longer controlling. The court then found that the proposal, if adopted, would violate the act. In addition, the court refused to stay its order denying the application for a writ, because (among other reasons) there was no irreparable harm since the initiative process would permit Petitioners to challenge JAMA's recognition of same-sex marriages after the law became final.

JAMA became effective on July 7, 2009. On September 1, a proposed initiative to set aside same-sex marriage was presented to the Board. Entitled the "Marriage Initiative of 2009," it proposed to amend D.C. Code § 46-401 *et seq.* (2005) by adding a new section providing, "Only marriage between a man and a woman is valid or recognized in the District of Columbia." In a Memorandum Opinion and Order issued November 17, the Board refused to

accept the initiative on the ground that it would authorize discrimination prohibited under the Human Rights Act. On November 18, Petitioners filed their "Petition for Review of Agency Decision and for Writ in the Nature of Mandamus" in this case.[3]

STATUTORY PROVISIONS

In 1973 the United States Congress enacted the District of Columbia Self-Government and Governmental Reorganization Act, commonly known as the Home Rule Act. Subchapter IV of the Home Rule Act is known as the "District Charter" or "Charter." It sets forth the basic organization and financial structure of the District of Columbia Government, including the means by which legislation is enacted. D.C. Code §§ 1-204.01 to 204.13 (2001). As originally passed by Congress in 1973, the Charter did not include the right of initiative. The Charter Amendments Act ("CAA") created this right in 1978. D.C. Code §§1-204.101 to 204.107 (2001). Because it amended the Charter, the CAA was enacted through a more rigorous procedure than an ordinary law. An amendment to the Charter requires an act of the Council, approval by a majority vote of the electorate, and Congressional review. D.C. Code § 1-203.03 (2001). The initiative procedure, which was created by an amendment to the Charter, can only be amended

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[3] Petitioners Harry R. Jackson, Jr., Walter E. Fauntroy, Dale E. Wafer, and Melvin Dupree were also Petitioners in *Jackson I*. Petitioners Robert King, James Silver, Anthony Evans, and Howard Butler were not parties in the earlier case.

through the same procedure. *Convention Ctr. Referendum Comm. v. District of Columbia Bd. of Elections & Ethics*, 441 A.2d 897, 915 (D.C. 1981) ("*Convention Ctr.*") (en banc) (plurality opinion). A mere statute is ineffective to amend the initiative provisions of the CAA.

The right of initiative created by the CAA is defined in one sentence: "'Initiative' means the process by which the electors of the District of Columbia may propose laws (except laws appropriating funds) and present such proposed laws directly to the registered qualified electors of the District of Columbia for their approval or disapproval." D.C. Code § 1-204.101 (a). In addition to creating this right, the CAA directed the Council "to adopt such acts as are necessary to carry out the purpose of this subpart [on initiatives, referendums, and recalls] within 180 days of the effective date." D.C. Code §1-204.107.

In accordance with this directive, the same Council that drafted the CAA (Council Period 2) drafted the Initiative, Referendum and Recall Procedures Act ("IPA") that implemented the CAA.[4] The IPA, however, was enacted in the normal way, solely by the Council. As a result, to the extent the IPA is inconsistent with the CAA, the IPA is invalid. *Convention Ctr.*, 441 A.2d at 915 (IPA valid "only insofar as it conforms to the underlying Charter Amendments"); *Price v. District of Columbia Bd. of Elections & Ethics*, 645 A.2d 594, 599 (D.C. 1994) (to

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[4] Although drafted during Council Period 2, the IPA was not passed until Council Period 3. *See also*, n.6 in this order.

the extent any IPA provision is inconsistent with the CAA, the latter controls).

The IPA authorizes the Board to refuse to accept a proposed initiative for the following reasons:

- It is "not a proper subject";
- The verified statement of contributions has not been filed;
- The petition is not in the correct form;
- "The measure authorizes, or would have the effect of authorizing, discrimination prohibited under Chapter 14 of Title 2" (the Human Rights Act); or
- "The measure . . . would negate or limit an act of the Council . . . pursuant to § 1-204.46" (appropriations).

D.C. Code § 1-1001.16 (b)(1). The items in quotes are subject-matter exclusions; the others relate merely to procedural requirements.

Thus, although the CAA defines an initiative as being an electoral process with only one subject-matter exclusion (appropriations), the IPA adds two other subject-matter exclusions. The first, pertaining to initiatives that are "not a proper subject," refers to acts forbidden under the Home Rule Act. *See* D.C. Code § 1-1001.16 (b)(3) (referring to a determination that "the measure is a proper subject of initiative . . . under the terms of title IV of the District of Columbia Home Rule Act"). In effect, this is a constitutional limitation and did not need to be repeated in the IPA to limit the initiative right. *See Shook v. District of Columbia Fin. Responsibility*

& Mgmt. Assistance Auth., 328 U.S. App. D.C. 74, 75, 132 F.3d 775, 776 (1998) (District Charter established by Home Rule Act is "similar in certain respects to a state constitution"). The IPA's other subject-matter exclusion is the provision barring initiatives that authorize or would have the effect of authorizing discrimination prohibited under the Human Rights Act.

ANALYSIS

1. The IPA validly incorporates the Human Rights Act

A central issue in this case is whether the IPA's addition of a requirement that initiatives not violate the Human Rights Act implemented the CAA or amended it. If the IPA merely carried out the purpose of the CAA when requiring initiatives to comply with the Human Rights Act, the requirement is valid. If, on the contrary, the Human Rights Act provision was an amendment to the CAA, the provision is unenforceable.

Petitioners argue that the Human Rights Act provision amends the CAA because that act authorizes the electorate "to propose laws (except laws appropriating funds)." The expression of only one subject-matter exclusion, indicates that all other subjects are proper for initiatives. This argument has a surface appeal, but it reads too narrowly the grant of authority provided by the CAA's direction that the Council enact legislation "necessary to carry out the purpose" of the initiative process. It is instructive to examine the latitude given

implementing regulations promulgated by an administrative agency in response to Congressional legislation. Although such regulations are accorded less deference than the enactments of a legislative body, the analogy seems useful because the difference in legislative weight between a Charter amendment and an ordinary statute implementing it is suggestive of the difference between a congressional act and implementing regulations.

In *Echazabal v. Chevron U.S.A, Inc.*, 226 F.3d 1063 (9th Cir. 2000), the court was faced with a situation remarkably similar in significant respects to the instant case. The Ninth Circuit followed a line of reasoning echoed by Petitioners in this case and invalidated the implementing regulations. This led to a 9-0 reversal by the United States Supreme Court in *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 153 L. Ed. 2d 82, 122 S. Ct. 2045 (2002). Because of its significance, the case will be discussed at length (using *Echazabal* to describe the case when it was before the Ninth Circuit and *Chevron U.S.A.* to describe the Supreme Court opinion).

Echazabal involved efforts by Mario Echazabal to obtain employment at a Chevron oil refinery. He had a liver ailment and was denied employment because Chevron's doctor concluded that exposure to solvents and other chemicals at the workplace could damage his liver. He sued under the Americans with Disabilities Act ("ADA"), and the case turned on the validity of the regulations implementing the act.

Although the ADA broadly proscribes screening out from employment individuals who have

disabilities, in the statute's "Defenses" section, the act provides that an employer may impose a "qualification standard" that "may include a requirement that an individual shall not pose a direct threat to the health or safety of *other individuals* in the workplace." *Echazabal*, 226 F.3d at 1066 (emphasis added). The statute directs the Equal Employment Opportunity Commission ("EEOC") to issue implementing regulations. *Id.* at 1069 n. 8. The EEOC's regulations state that the defense may exclude from employment a person who poses "a direct threat to the health or safety *of the individual* or others in the workplace." *Id.* at 1066. The Ninth Circuit concluded that the EEOC invalidly amended, rather than merely implemented, the statute when the regulations added a defense linked to the potential employee's own health.

In reaching this conclusion, the Ninth Circuit looked first to the clear language of the statute.

> Here, that language is dispositive . . . . On its face, the provision does not include direct threats to the health or safety of the disabled individual himself. Moreover, by specifying only threats to "other individuals in the workplace," the statute makes it clear that threats to other persons -- including the disabled individual himself -- are not included within the scope of the defense. *Expressio unius est exclusio alterius.* Finally, the obvious reading of the direct threat defense as not including threats to oneself is supported by the definitional section of Title I, which states that the term "direct threat"

> *means* a significant risk to the health or safety *of others* that cannot be eliminated by reasonable accommodation . . . . The fact that the statute consistently defines the direct threat defense to include only threats to others eliminates any possibility that Congress committed a drafting error when it omitted from the defense threats to the disabled individual himself.

Echazabal, 266 F.3d at 1066-67 (footnotes and internal citations omitted; emphasis in original).

The court also considered the statute's legislative history and found it consistent with the clear language of the act. The court stated:

> Although we need not rely on it, the legislative history of the ADA also supports the conclusion that the direct threat provision does not include threats to oneself. The term "direct threat" is used hundreds of times throughout the ADA's legislative history -- in the final conference report, the various committee reports and hearings, and the floor debate. In nearly every instance in which the term appears, it is accompanied by a reference to the threat to "others" or to "other individuals in the workplace." Not once is the term accompanied by a reference to threats to the disabled person himself. In addition, both the Report of the House Judiciary in [sic] the Report of the Committee on Education and Labor explain that the direct threat provision is intended to

> codify the Supreme Court's holding in *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 94 L. Ed. 2d 307, 107 S. Ct. 1123 (1987) -- a case that defines "the term 'direct threat' [to] mean[] a significant risk to the health or safety *of others* that cannot be eliminated by reasonable accommodation . . . . In short, the legislative history convincingly supports the unambiguous wording of the direct threat defense.

Id. at 1067-68 (brackets (except for [sic]) and emphasis in original).

The court considered the policies underlying the ADA and concluded that the regulatory provision was inconsistent with those goals. Again, quoting the court:

> Congress's decision not to include threats to one's own health or safety in the direct threat defense makes good sense in light of the principles that underlie the ADA . . . . As Senator Kennedy noted . . . the ADA was designed in part to prohibit discrimination against individuals with disabilities that takes the form of paternalism. This goal is codified in the Act itself: in the "Findings" section of the ADA, Congress concluded that "overprotective rules and policies" are one form of discrimination confronting individuals with disabilities.

Id. at 1068 (internal citations omitted).

Having concluded that the regulation was contrary to Congress's clear intention, the court declined to give deference to the EEOC's interpretation of the "direct threat" provision. "Accordingly," said the court, "we reject the EEOC's contrary interpretation." *Id.* at 1069.

The reasoning of the Ninth Circuit is consistent with Petitioners' arguments in the instant case: the CAA expresses only one exception to the initiative procedure; the statute is clear and should be enforced by its terms; any ambiguity should be resolved by application of the doctrine, *expressio unius est exclusio alterius*; Petitioner's interpretation is consistent with the policy that the right to initiative should be broadly interpreted; deference should not be accorded the Council's interpretation of the CAA; and the implementing legislation, which added another requirement beyond the one expressed in the act, invalidly amends the statute.

In *Chevron U.S.A.*, the United States Supreme Court found the similar assertions in *Echazabal* unpersuasive. The Supreme Court acknowledged that the EEOC's regulation "carries the defense one step further, in allowing an employer to screen out a potential worker with a disability not only for risks that he would pose to others in the workplace but for risks on the job to his own health or safety as well." 536 U.S. at 78. The Court rejected, however, Mr. Echazabal's argument that this overstepped limitations imposed by the clear language of the act. The Court noted:

> The argument follows the reliance of the Ninth Circuit majority on the interpretive canon, *expressio unius exclusio alterius*, "expressing one item of [an] associated group or series excludes another left unmentioned." . . . . The rule is fine when it applies, but this case joins some others in showing when it does not.

Id. at 80 (brackets in original; internal citation omitted).

In declining to apply *expressio unius*, the Supreme Court first noted that the statutory text suggests an absence of exclusiveness. The ADA, in describing the "qualification standard" defense, states that the standard "may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." *Id.* at 78. The phrase "may include," said the Court, points toward "spacious defensive categories, which seem to give an agency (or in the absence of agency action, a court) a good deal of discretion in setting the limits of permissible qualification standards." *Id.* at 80.

"Strike two," in the Court's phrase, was that the limited scope of *expressio unius* rendered it inapplicable to the case. *Id.* at 81. The mere inclusion of only one eligible category does not bring a statute within the canon. As the court explained:

> [An] essential extrastatutory ingredient of an expression-exclusion demonstration [is] the series of terms from which an omission

> bespeaks a negative implication. The canon depends on identifying a series of two or more terms or things that should be understood to go hand in hand, which are abridged in circumstances supporting a sensible inference that the term left out must have been meant to be excluded. E. Crawford, Construction of Statutes 337 (1940) (*expressio unius* "properly applies only when in the natural association of ideas in the mind of the reader that which is expressed is so set over by way of strong contrast to that which is omitted that the contrast enforces the affirmative inference.". . . Strike two in this case is the failure to identify any such established series, including both threats to others and threats to self, from which Congress appears to have made a deliberate choice to omit the latter item as a signal of the affirmative defense's scope.

Id. (bracketed content added; internal citation deleted).

The Court went on to note "even a third strike" against applying *expressio unius*: "It is simply that there is no apparent stopping point to the argument that by specifying a threat to others defense Congress intended a negative implication about those whose safety could be considered." *Id.* at 83. What, the Court wondered, would an employer do under such an interpretation if a potential employee

posed a threat to the health of the general public.[5] *Id.* at 83-84.

The *Echazabal/Chevron U.S.A.* case has been discussed at length because the following parallels are compelling and instructive:

- In that case, as in the instant case, a statute creating a right named only one category. The ADA's "qualification standard" defense encompassed only threats as affecting only "other individuals." In the CAA, the initiative expressly excluded only appropriations measures.
- Both statutes include language that invites the exercise of discretion. The ADA provides that the "qualification standard" defense "may include" the named category. The CAA directs the Council to enact legislation "necessary to carry out the purpose" of the initiative provisions.
- In neither statute does the legislative history manifest consideration of a series of potentially included items that were "abridged in circumstances supporting a sensible inference that the term left out must have been meant to be excluded." *Chevron U.S.A.*, 536 U.S. at 81.

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[5] "If Typhoid Mary had come under the ADA, would a meat packer have been defenseless if Mary had sued after being turned away?" *Id.* at 84.

- Both statutes directed a named entity to develop implementing provisions: in the ADA, the EEOC; in the CAA, the Council. Both entities are due a degree of deference shared with other interpretive bodies. *Chevron U.S.A.*, 536 U.S. at 82; *Hessey v. District of Columbia Bd. of Elections & Ethics*, 601 A.2d 3, 9 (D.C. 1991) (en banc) ("*Hessey I*") ("Because the Charter Amendment is in the form of an act passed by the Council, and because the Charter Amendment on the right of initiative included authority for the Council to adopt implementing legislation, the court must address the intent of the Council," as well as the intent of Congress.).
- With respect to both statutes, if the implementing provisions were restricted to the single category included in the express statutory language, this could lead to results contrary to the intent of the legislature. Under the ADA, a disease carrier working in a food plant could infect the public. Under the CAA, the majority could ostracize a disfavored minority in violation of District of Columbia law.
- The implementing provisions for both statutes expanded the act beyond the one named category.

The task addressed by the Supreme Court was to determine the intention of the legislature in enacting the statute and to consider this intention when evaluating the validity of the implementing regulation. Because the implementing regulation in

Chevron U.S.A. was consistent with the legislature's intent in enacting the ADA, Supreme Court upheld the regulation.

The Council's action is equally valid. Moreover, a clinching consideration in the instant case, which is absent in *Chevron U.S.A.*, is that here the same body, Council Period 2, drafted the CAA; the Human Rights Act; and the IPA, which implemented the CAA and incorporated the Human Rights Act.[6] The most reasonable interpretation of events is that Council Period 2 knew what it intended when it directed itself "to adopt such acts as are necessary to carry out the purpose of this subpart within 180 days" and that this intention included protection of minorities from the possibility of discriminatory initiatives. In the Committee Report on the bill that became the IPA, this intention was expressed in strong terms:

> The . . . initiative process may not be used to place the Government in the posture of affirmatively condoning discrimination . . . . Implicit restrictions, not expressly contained in an "initiative charter" are thus supportable. That restriction has been implied by the Courts. Under applicable case law, it is clear that a community cannot by

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[6] Although the IPA's Human Rights Act provision was drafted in Counsel Period 2, the IPA was enacted in Counsel Period 3. The vote was unanimous, and 10 of the 12 votes were from Councilmembers who had served in Council Period 2. *See* Intervenor's Resp. to *Amicus Curiae* Br. of Am. Ctr. for Law and Justice *et al.*; Mem. of *Amicus* Blake *et al.*, pp. 26-27.

> initiative authorize discrimination as a matter of government policy.

Committee Report on Bill 2-317, Initiative, Referendum, and Recall Procedures Act of 1978, at 9 (Council of the District of Columbia, May 3, 1978). It strains credulity to conclude that these strongly held views did not inform the same Council when, a few months prior, it authorized itself to "enact legislation to carry out the purpose" of the CAA.

For the above reasons, the court is constrained to reject Petitioners' facially appealing argument. *Chevron U.S.A.* demonstrates that implementing provisions need not be as narrowly confined as Petitioners argue. The IPA's Human Rights Act provision is consistent with the intent of the CAA and does not impermissibly create a new exception to the initiative right.

2. The proposed initiative violates the Human Rights Act

The Human Rights Act provides, in pertinent part, that "It shall be an unlawful discriminatory practice to do any of the following acts, wholly or partially for a discriminatory reason based upon the actual or perceived . . . sexual orientation [or] gender identity . . . of any individual." D.C. Code § 2-1402.11 (2001). Under current law, same-sex individuals in the District of Columbia who were validly married in other states are considered validly married in the District of Columbia. D.C. Code § 46-405.01 (2009 Supp.).

The proposed initiative would invalidate D.C. Code § 46-405.01 by establishing that "only marriage between a man and a woman is valid or recognized in the District of Columbia." Petrs.' Mot. for Summ. J., Ex. A. If enacted, the initiative would deprive only same-sex individuals of the legal status, rights, and privileges they enjoy as married persons. Such an initiative patently "authorizes or would have the effect of authorizing discrimination based upon . . . actual or perceived . . . sexual orientation [or] gender identity." The Board properly rejected the proposed initiative on this ground.

3. The proposed initiative transgresses the implied restriction against violations of law

The fact that the proposed initiative, if passed, would violate the Human Rights Act provides an independent basis for upholding the Board's decision: the initiative runs afoul of an implied exclusion barring provisions that violates the state's law.[7] As noted, the right of initiative established by the CAA has one only one express exclusion, which relates to appropriations. Petitioners do not argue that this is the only exclusion imposed upon the initiative right, however. They acknowledge that there are implied exclusions, as well. Petitioners

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[7] Even if the IPA's reference to the Human Rights Act were stricken, the initiative would still be improper as violative of this implied restriction. The prohibition against violating state law should not be conflated with the concepts of amending or repealing legislation, which are properly within the initiative power. *See generally, Convention. Ctr.*, 441 A.2d at 896-97 (discussing "The Scope of the Initiative Power").

would limit these implied exclusions to those found in the Home Rule Act, D.C. Code §§ 1-201.01 *et seq.*

The Home Rule Act is the District of Columbia's analog to a State constitution. *See Shook*, 132 F.3d at 776 (1998) (District Charter established by Home Rule Act is "similar in certain respects to a state constitution"); *District of Columbia v. Washington Home Ownership Council, Inc.*, 415 A.2d 1349, 1367 (D.C. 1980) (deference to City Council "is not appropriate . . . when the issue is interpretation of the 'constitution'" (i.e., the Home Rule Act)). Under the Home Rule Act, the City Council may not pass legislation that would --

- violate the United States Constitution (D.C Code § 1-203.02 (2001));
- violate an act of Congress (D.C. Code § 1-206.01 (2001));
- violate any provisions of the Home Rule Act (D.C. Code § 1-206.02 (2001));
- tax the property of the United States or any State (*id.*);
- lend the public credit for support of any private undertaking (id.);
- tax the personal income of any person who is not a resident of the District (*id.*);
- permit the construction of any building exceeding height limitations (*id.*);
- legislate with respect to the Commission on Mental Health (*id.*);
- legislate with respect to the United States Courts, United States Attorney, or United States Marshal for the District of Columbia (*id.*);

- legislate with respect to the District of Columbia Financial Responsibility and Management Assistance Authority (*id.*);
- enlarge existing District of Columbia authority over the National Zoological Park, National Guard of the District of Columbia, Washington Aqueduct, National Capital Planning Commission, or any federal agency (*id.*);
- issue bonds in excess of allowed amounts (D.C. Code § 1-206.03 (b)(1) (2001)); or
- approve a budget that would result in expenditures during any fiscal year in excess of available resources (D.C. Code § 1-206.03 (c) (2001)).[8]

The Home Rule Act does not forbid the Council from enacting discriminatory legislation, except to the extent such legislation falls within the above restrictions. Petitioners argue that the right of initiative is "coextensive" with the Council's power to enact laws. Accordingly, they assert, because the Council's direct legislation does not have to survive a preliminary Human Rights Act analysis, neither do initiatives. This argument fails because its premise is faulty. The rule expressed by the District of Columbia Court of Appeals is, "*absent express or implied limitation*, the power of the electorate to act by initiative is coextensive with the power of the legislature to adopt legislative measures." *Convention Ctr.*, 441 A.2d at 897 (emphasis added).

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[8] An additional limitation, which is not currently applicable, pertains to Council action during any fiscal year designated a "control year." *See* D.C. Code § 1-206.03 (f) (2001).

Our Court of Appeals has recognized on more than one occasion that initiatives may be barred by implied limitations that are not included in the Home Rule Act. In *Hessey v. District of Columbia Bd. of Elections & Ethics*, 615 A.2d 562, 578 (D.C. 1992) (*Hessey II*), the Court of Appeals held that an implied restriction bars initiatives that are "administrative," as distinguished from "legislative." *Hessey II* considered whether an initiative that would allow any taxpayer to appeal specific property tax assessments was administrative or legislative in character because "an initiative cannot extend to administrative matters." *Id.* (quoting *Convention Ctr.*, 441 A.2d at 907). An administrative measure is defined as one that "merely proposes to execute a law already in existence." *Hessey II*, 615 A.2d at 578. Such an initiative is invalid because it is not within the Initiative Act's grant of the power to make "laws." *Id.*

This restriction against administrative acts is not expressly set forth in the CAA, which broadly states that the electorate has the power to "propose laws (except laws appropriating funds)." D.C. Code § 1-104.101. Rather, this prohibition is an implied restriction found by the Court. Of course, the Council has the power to enact administrative measures designed to "execute a law already in existence" -- the IPA is such an act. Thus, *Hessey II* illustrates both that implied restrictions exist which are not expressed in the Home Rule Act and that the power of initiative is not coextensive with the Council's power to legislate.

Decisive in the instant case is another implied restriction recognized by our Court of Appeals: an initiative may not violate state law. In *Hessey II*, the Court considered whether to adjudicate the challenge to the proposed initiative before it was submitted to the voters. Opponents of the initiative argued that pre-election review was appropriate because, if passed, the initiative would violate the Fourteenth Amendment. The Court favorably quoted *Whitson v. Anchorage*, 608 P.2d 759, 762 (Alaska 1980) for the proposition that pre-election review would be appropriate where it "is in clear conflict with a state *statute*" because any election would therefore be useless (emphasis added). *Hessey II*, 615 A.2d at 574. *Whitson* was also favorably cited in *Convention Ctr*, 441 A.2d at 899, for the proposition that states have permitted review pre-election review of initiatives that are "wholly *illegal* or unconstitutional" (emphasis added).

Although our Court of Appeals has not otherwise had occasion to refer to the implied restriction barring initiatives that violate state law, the highest courts in other jurisdictions have considered this issue. In *Berent v. City of Iowa City*, 738 N.W.2d 193 (Iowa 2007), the Iowa Supreme Court held that an initiative that would subject the city manager and police chief to retention elections violated state law and, accordingly, refused to permit the initiative to be presented to the voters. In *R.G. Moore Bldg. Corp. v. Comm. for the Repeal of Ordinance R(C)-88-13*, 391 S.E.2d 587 (Va. 1990), the court considered whether a referendum to change a zoning decision should be kept from the voters because it violated state law. The court concluded that the referendum

was "compatible, and not in conflict, with state statutes" and permitted it to go forward. *Id.*, at 590, 592. In *Von Staich v. Briggs*, 2006 U.S. Dist. LEXIS 5262 (N.D. Cal. 2006), the court rejected a prisoner's challenge to an initiative, holding that the initiative did not violate state law by failing to require parole boards to set a maximum term when denying a prisoner a parole date. *See also Haumant v. Griffin*, 699 N.W.2d 774 (Minn. 2005) (initiative to amend Minneapolis's charter by authorizing medical marijuana use is invalid as violative of state law and state public policy).

Although not binding, this persuasive authority has an accumulated weight. Our Court of Appeals has favorably cited *Whitson*, considered the leading case for this issue, twice. *Hessey II*, 615 A.2d at 574; *Convention Ctr*, 441 A.2d at 899. The undersigned judge is persuaded that, if it considers the issue, our supervisory court will conclude that an implied limitation exists barring initiatives from violating existing statutes.

4. Other issues

The court will summarily discuss other issues, in the interest of adherence to the IPA's direction that the Superior Court expedite consideration of the petition. D.C. Code § 1-1001.16 (b)(3).

(a) Dean

Petitioners argue that application of the Human Rights Act to the proposed initiative is precluded by the District of Columbia Court of Appeals decision in

Dean. There, the Court of Appeals held that the Human Rights Act does not apply to marriage. Petitioners assert that, because the proposed initiative defines marriage and because *Dean* has never been overruled, the decision is binding. This would compel the conclusion that the Board could not apply the Human Rights Act to bar the proposed initiative.

As applicable to this case, *Dean* considered whether the Clerk of the District of Columbia Superior Court violated the Human Rights Act in refusing to issue a marriage license to a same- sex couple. The Court of Appeals considered the legislative history of the Human Rights Act, the statutory context in which it was passed, and the law as it existed at the time of the decision. It is significant that the case was decided in 1995. At that time, the Council had not enacted any legislation that called into question the continuing vitality of the "fundamental legislative understanding that 'marriage' is limited to opposite-sex couples." *Dean*, 653 A.2d at 314.

Since 1995, the Council has changed the landscape *Dean* surveyed. Indeed, all of the statutory provisions upon which *Dean* relied have been repealed or amended to allow for same-sex marriages. *See* Intervenor's Mot. to Dismiss or in the Alternative for Summ. J., p. 31 and chart provided at hearing of January 6, 2010. Most pertinently for this case, JAMA became effective on July 7, 2009. This act (i) amended the consanguinity provisions of the D.C. Code §§ 46-401 (1)-(2) (2005) to make the provisions gender neutral and (ii) added §

46-405.01 to recognize same-sex marriages that are valid in the place where the marriage was solemnized. These clear manifestations of intent to alter the traditional definition of marriage did not exist when *Dean* was decided. *Dean* expressly relied upon the absence of such indications in concluding that the Council intended to retain the definition of marriage as occurring only between a man and a woman. Under these circumstances, *Dean's* holding is no longer controlling.

(b) Preclusion

The government argues that the petition seeking to overturn the Board's decision in this case is barred by the doctrines of *res judicata* and/or collateral estoppel. The District would accord preclusive effect to the related case of *Jackson I*. For either doctrine to apply, however, there must be privity between the parties in *Jackson I* and this case. Four of the Petitioners in this case did not participate in *Jackson I*, and there is no showing that they were in privity with those who did. Thus, even if the other elements of *res judicata* or collateral estoppel are established with respect to the Petitioners who participated in *Jackson I*, this case would still go forward because of the presence of the four who did not.

Even with respect to the Petitioners who participated in both cases, however, the elements of *res judicata* or collateral estoppel are not met. *Res judicata* is inapplicable because both the claim and judgment in *Jackson I* involved different issues from those in the instant case. *Jackson I* concerned the

Board's denial of a proposed referendum, while the instant case involves a separate action by the Board with respect to a proposed initiative with different text from the proposed referendum.

Collateral estoppel is inapplicable because *Jackson I* did not decide the same issues as are raised in this case. *Jackson I* did not consider (i) the validity of the IPA's incorporation of the Human Rights Act into the initiative review process and (ii) the applicability of *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995) to the proposed initiative. *See Patton v. Klein*, 746 A.2d 866, 869 (D.C. 1999) (quoting *Short v. District of Columbia Dep't of Employment Servs.*, 723 A.2d 845, 849-50 (D.C. 1998)) ("Collateral estoppel does not apply if the issues are not identical, even if the issues are similar.")

(c) Exhaustion

The District asserts that Petitioners may not challenge the IPA's incorporation of the Human Rights Act into the CAA because they did not exhaust their administrative remedies by raising this issue before the Board. The District's argument fails for two reasons. First, exhaustion was not required because the appropriate forum for adjudicating the validity of the Human Rights Provision is the court, not the Board. *See Debruhl v. District of Columbia Hackers' License Appeal Bd.*, 384 A.2d 421, 425 (D.C. 1978) (assumes, without deciding, that an administrative agency is without authority to invalidate the statutory scheme under which it operates); *Rhema Christian Ctr. v. District*

of Columbia Bd. of Zoning Adjustment, 515 A.2d 189, 197 (D.C. 1986) (notes that it is "a dubious proposition" that the zoning board has subject matter jurisdiction to rule on the constitutionality of zoning regulations); *Barnett v. District of Columbia Dept. of Employment Servs.*, 491 A.2d 156, 1159 n. 4 (D.C. 1985) (citing *Matthews v. Diaz*, 426 U.S. 67, 76-77, 96 S.Ct 1883, 1889-90, 48 L.Ed.2d 478 (1976)) ("agency had no authority to make determination of constitutionality").

Second, as the District recognizes, exhaustion of administrative remedies is not a jurisdictional prerequisite to bringing an action before the court. *Burton v. District of Columbia*, 835 A.2d 1076, 1079 (D.C. 2003). The requirement is a rule of judicial administration that may be waived for compelling circumstances. *Id.* Compelling circumstances are present in this case because (i) the court is the appropriate forum for resolution of the issue; (ii) there is no prejudice to the District, which has fully briefed the issue; and (iii) resolution of the issue now, instead of awaiting the result of a remand, will serve the IPA's direction that the "Superior Court . . . shall expedite consideration" of challenges to the Board's initiative decisions (D.C. Code § 1-1001.16 (b)(3)).

CONCLUSION

ACCORDINGLY, for the reasons stated above, it is this 14th day of January 2010, hereby

ORDERED, that "Petitioners' Motion for Summary Judgment," filed November 20, 2009, is DENIED. It is further

ORDERED, that Petitioners' request for a writ in the nature of mandamus is DENIED. It is further

ORDERED, that "District of Columbia's Motion to Dismiss, or in the Alternative, for Summary Judgment," filed December 18, 2009, is GRANTED. It is further

ORDERED, that Summary Judgment is entered in favor of the District of Columbia Board of Elections and Ethics and the District of Columbia.

s/Judge Judith N. Macaluso
Judge Judith N. Macaluso

(Signed in Chambers)

DISTRICT OF COLUMBIA
BOARD OF ELECTIONS AND ETHICS

InRe:	)	
	)	Administrative Hearing
Marriage Initiative of 2009	)	No. 09-006

MEMORANDUM OPINION AND ORDER

I. Introduction

This matter came before the District of Columbia Board of Elections and Ethics (hereinafter "the Board") during a special hearing on Monday, October 26, 2009 pursuant to the submission of a proposed initiative measure, the "Marriage Initiative of 2009" ("the Initiative"). The Initiative, if passed, would establish that "only marriage between a man and a woman is valid or recognized in the District of Columbia."[1] The purpose of the special hearing was to determine whether or not the Initiative presents a proper subject matter for initiative in the District. Reverend Harry R. Jackson, Jr. ("Rev. Jackson"), the lead proposer of the Initiative, appeared before the Board, and was also represented at the hearing by Cleta Mitchell, Esq. of Foley & Lardner LLP, and

[1] Summary Statement, Initiative.

Austin R. Nimocks, Esq. of the Alliance Defense Fund.[2] Chairman Errol R. Arthur and Board member Charles R. Lowery, Jr. presided over the hearing.

II. Statement of the Facts

On July 7, 2009, the "Jury and Marriage Amendment Act of 2009" ("JAMA") was enacted. As a result of JAMA's passage, same-sex marriages entered into and recognized as valid in other jurisdictions are now recognized as valid marriages in the District.[3]

JAMA was the target of an unsuccessful referendum attempt. Sixteen days after the Council of the District of Columbia ("the Council") submitted JAMA to Congress,[4] Rev. Jackson and others submitted to the Board a referendum entitled the "Referendum Concerning the Jury and Marriage Amendment Act of 2009" ("the Referendum"), which sought to suspend the section of JAMA pertaining to same-sex marriages until it had been presented to the registered qualified electors of the District of Columbia for their approval or rejection. On June 15, 2009, the Board ruled that the Referendum was not a proper subject for referendum because it

> would, in contravention of the [Human Rights Act ("HRA")], strip same-sex couples

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[2] Brian W. Raum, Esq. and Timothy J. Tracey, Esq. also filed Notices of Appearance with the Board on behalf of Rev. Jackson and the other proponents.

[3] *See* D.C. Official Code § 46-405.01.

[4] *See* D.C. Official Code § 1-206.02(c)(1) (2006).

> of the rights and responsibilities of marriage that they were afforded by virtue of entering into valid marriages elsewhere, and that the Council intends to clearly make available to them here in the District, simply on the basis of their sexual orientation. Because the Referendum would authorize discrimination prohibited by the HRA, it is not a proper subject for referendum, and may not be accepted by the Board.[5]

On June 17, 2009, the proposers of the Referendum filed with the D.C. Superior Court a petition for review of the Board's decision and for a writ in the nature of mandamus to compel the Board to accept the Referendum. The proposers subsequently filed a motion for preliminary injunction to stay the effective date of JAMA until either the end of litigation, in the event that they lost on the merits, or thirty (30) days after the Board provided them with an original petition form for signature collection if they won on the merits. The proposers sought this injunctive relief because it was clear that, in light of the litigation, there was insufficient time for the Referendum to complete the entire referendum process prior to JAMA becoming effective.[6]

In its opposition to the proposers' motion for preliminary injunction, the Board argued, *inter alia*,

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[5] Board Memorandum Opinion and Order, "In Re: Referendum Concerning the Jury And Marriage Amendment Act of2009, 09-004 (June 15,2009) ("Board Referendum Order")

[6] JAMA was scheduled to, and did, complete the Congressional review period on July 6, 2009.

that the proposers would not be irreparably harmed in the absence of a stay of JAMA's effective date because, even if JAMA were enacted, the proposers "could still avail themselves of the initiative process."[7] The Board referenced the legislative history of the Initiative, Referendum, and Recall Charter Amendments Act of 1978 ("the Charter Amendments Act"),[8] which created the right of initiative and referendum. This legislative history clarified that "[s]hould the citizens desire, basically, to reverse a decision of the Council which has already become law, they would then have the ability to initiate through the initiative process the same measure to the ballot," provided the initiative at issue is a proper subject for initiative pursuant to D.C. Official Code § 1-1001.16(b)(l).[9]

On June 30, 2009, the court issued an order denying the proposers' requests for relief, finding that the "Board correctly concluded that the proposed referendum would violate the District of Columbia Human Rights Act[.]"[10] Specifically, the court determined that, because the

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[7] Respondent District of Columbia Board of Elections and Ethics' Opposition to Petitioners' Motion for Preliminary Injunction ("Board Preliminary Injunction Opposition") at 21, *Jackson v. District of Columbia Bd ofElections and Ethics*, No. 2009 CA 004350 B slip op. (D.C. Superior Ct. 2009)("*Jackson*").

[8] D.C. Law 2-46, 24 D.C. Reg. 199 (1978) (*codified as amended* at D.C. Official Code § 1-204.101 et seq.).

[9] *Convention Center Referendum Committee v. District of Columbia Bd of Elections*, 449 A.2d 889, 910 n.38 (D.C. 1991).

[10] *Jackson* at 2.

> proposed referendum asks the voters to decide whether the District should recognize same-sex marriages -which are legally indistinguishable from opposite sex marriages in the jurisdictions in which they were performed - solely on the basis of the person's gender or sexual orientation[, the] measure 'authorizes or would have the effect of authorizing discrimination prohibited under the [DCHRA],' and hence is not a proper subject for referendum.[11]

Moreover, the court agreed that the proposers would not be irreparably harmed if the court did not grant a stay of JAMA's effective date, noting that

> the District's Home Rule Act provides the right of initiative for voters to repeal a law. *Moreover, Petitioners' right to referendum has not been deprived. The Board did not refuse to consider Petitioners' proposed referendum, and this Court has not declined to exercise jurisdiction.* Petitioners' proposed referendum has followed the course contemplated for all referenda pursuant to D.C. Code § 1-1001.16—a course successfully charted by others who have sought to submit District legislation to a direct vote. *Petitioners are entitled to the process outlined in D.C. Code § 1-1001.16. They are not entitled to a favorable ruling on whether their*

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[11] *Id.* at 8.

proposed referendum meets the legal requirements established by District law.[12]

On September 1, 2009, Rev. Jackson, Howard Butler, Melvin Dupree, Rev. Anthony Evans, Rev. Walter E. Fauntroy, Robert King, James Silver, and Rev. Dale E. Wafer ("the Proposers") filed the Initiative with the Board.[13] Also on September 1, the Proposers filed a verified statement of contributions with the D.C. Office of Campaign Finance.[14] On September 10, 2009, the Board's Office of the General Counsel ("the General Counsel") transmitted a Notice of Public Hearing and Intent to Review regarding the Initiative ("the Notice") to the Office of Documents and Administrative Issuances for publication in the D.C. Register.[15] On September 10, the General Counsel also sent the Notice to the Mayor, the Chairman of the D.C. Council, the D.C. Attorney General, and the General Counsel for the Council, inviting them to address the issue of whether the Initiative presents a proper subject for initiative. The Notice was published in the D.C. Register on September 18, 2009.

The Board held the proper subject hearing on October 26, 2009.[16] In response to the Board's invitation to comment on the propriety of the Initiative, the Board received written testimony and heard oral testimony during the hearing from numerous individuals and organizations. The Board

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[12] *Jackson* at 2 (emphasis added).
[13] *See* D.C. Official Code § 1-1001.16(a) (2006).
[14] *See* D.C. Official Code § 1-1001.16 (b)(l)(A) (2006).
[15] *See* D.C. Mun. Regs. tit. 3 § 1001.2 (2007).
[16] *See* D.C. Mun. Regs. tit. 3 § 1001.3 (2007).

also held the record open for additional comments until the close of business on October 28, 2009. In all, the Board heard testimony from 60 witnesses and received and considered comments from approximately 29 individuals and/or organizations.

III. Analysis

A. Introduction

The Board shall refuse to accept an initiative measure if it:

> finds that it is not a proper subject of initiative ... under the terms of Title IV of the District of Columbia Home Rule Act or upon any of the following grounds:
>
> (A) The verified statement of contributions has not been filed pursuant to §§ 1-1102.04 and 1-1102.06;[17]
>
> (B) The petition is not in the proper form established in subsection (a) of this section.[18]

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[17] The verified statement of contributions consists of the statement of organization required by D.C. Official Code § 1-1102.04 and the report of receipts and expenditures required by D.C. Official Code § 1-1102.06.

[18] D.C. Official Code § 1-1001.16 (a) provides that initiative measure proposers must file with the Board "5 printed or typewritten copies of the full text of the measure, a summary statement of not more than 100 words, and a short title of the measure to be proposed in an initiative."

(C) The measure authorizes, or would have the effect of authorizing, discrimination prohibited under Chapter 14 of Title 2;[19] or

(D) The measure presented would negate or limit an act of the Council of the District of Columbia pursuant to § 1-204.46.[2021]

Based upon the written and oral opinions submitted to the Board regarding the propriety of the Initiative, the Board's own research and consideration of the matter, and the D.C. Superior Court's ruling in *Jackson*, the Board now concludes that the Initiative does not present a proper subject of initiative because it would authorize discrimination prohibited under the Human Rights Act ("HRA").

B. JAMA and the Referendum

As of July 2009, the District now recognizes same-sex marriages entered into and recognized as valid in other jurisdictions. Massachusetts, Connecticut, Iowa, Vermont, and New Hampshire currently permit, or are set to permit, same-sex marriages. From June 2008 until November 2008, California also authorized same-sex marriages. In November of 2008, California voters voted in favor of

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[19] Chapter 14 of Title 2 of the D.C. Official Code contains the District of Columbia Human Rights Act. *See* D.C. Official Code § 2-1401.01 *et seq.* (2006 Repl.).

[20] D.C. Official Code § 1-204.46 deals with budgetary acts of the D.C. Council.

[21] D.C. Official Code § 1-1001.16 (b)(l) (2006 Repl.)

Proposition 8, an initiative constitutional amendment banning same-sex marriages. However, same-sex marriages performed prior to the enactment of the proposition are still recognized as valid in California. Additionally, Belgium, Canada, the Netherlands, Norway, South Africa, Spain, and Sweden allow same-sex marriages. Accordingly, if a same-sex couple entered into a marriage in anyone of the aforementioned jurisdictions during a time when same-sex marriage was recognized as valid in that jurisdiction, that marriage is now recognized as valid in the District, provided it is otherwise lawful under District law.[22]

As discussed above, the Board had occasion to consider whether or not the section of JAMA pertaining to same-sex marriages was susceptible to referendum. In its Board Referendum Order, which the D.C. Superior Court affirmed, the Board held that it was not because it represented a legislative effort to abolish in the District distinctions between valid marriages entered into in other jurisdictions on the basis of sexual orientation. As such, JAMA was covered by the HRA, the stated purpose of which is to

> secure an end in the District of Columbia to discrimination for any reason other than individual merit, including, but not limited

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[22] *See* D.C. Official Code §§ 46-401 - 403. Marriages are not lawful in the District if they are: incestuous or bigamous; have been judicially declared null and void; or contain at least one individual who is not of the age of consent, is unable to consent to marriage due to mental incapacity, and/or has been forced or fraudulently tricked into consenting to the marriage.

> to, discrimination by reason of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, familial status, family responsibilities, matriculation, political affiliation, disability, source of income, and place of residence or business.[23]

The Board further noted that JAMA comported with "[e]xisting District law [which] requires the recognition of marriages that were valid at their place of celebration."[24] and that it

> unequivocally declares that the District is a jurisdiction that affords full faith and credit to valid same-sex marriages[,][25] [that it was] consistent with recent efforts by the Council

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[23] D.C. Official Code § 2-1401.01 (2006 Repl.).

[24] Letter from Brian Flowers, General Counsel, Council of the District of Columbia, to Kenneth J. McGhie, General Council, D.C. Board of Elections and Ethics regarding the Referendum on Jury and Marriage Amendment Act of 2009 (June 9, 2009)("Flowers Letter") at 6 (discussing laws and cases supporting proposition that "the District has recognized marriages valid in the state in which they were solemnized, unless the marriage was between persons domiciled in the District at the time of the marriage and the marriage would have been expressly prohibited by one of the provisions contained in D.C. Official Code § 46-401 through 46-404, or the marriage is in violation of the 'strong public policy' of the District.").

[25] "This amendment makes clear what is already the law: to recognize marriages duly performed in other jurisdictions, including officially sanctioned marriages between persons of the same-sex." Amendment offered by Councilmember Phil Mendelson to Bill 18-10, Disclosure to the United States District Court Act of 2009 (Committee Print) (April 7, 2009).

> to eradicate impermissible discrimination on the basis of same-sex discrimination by putting same-sex couples on a par with heterosexual couples in numerous provisions of District law[, for e.g., the] Domestic Partnership Judicial Determination of Parentage Amendment Act of 2009, a partial aim of which was to "formally acknowledge that families created by same-sex couples are not distinguishable from any other family currently recognized under District law,"[26] [and] . . . Council efforts to remove gender-specific references in statutes pertaining to marriage and/or the rights and responsibilities thereof[.][27] [28]

Finally, the Board considered the impact of *Dean v. District of Columbia* ("*Dean*")[29], a case cited by both proposers and opponents of the Initiative, on the matter. In *Dean*, the D.C. Court of Appeals ruled, *inter alia*, that the practice of denying marriage licenses to same-sex couples did not violate the HRA. The court reasoned that the HRA, though "a powerful, flexible, and far-reaching prohibition

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[26] Report of the Committee on Public Safety and the Judiciary on Bill 18-66, the Domestic Partnership Judicial Determination of Parentage Amendment Act of 2009 at 9 (Council of the District of Columbia, March 10, 2009).

[27] Flowers Letter at 8 (discussing fact that several statutory provisions "have been amended by the Council to remove the gender-specific references as part of a systemic effort to employ gender-neutral language throughout the D.C. Official Code statutes pertaining to marriage and the rights, benefits, and obligations incident to marriage.").

[28] Board Referendum Order at 10.

[29] 653 A.2d 307 (D.C. 1995).

against discrimination of many kinds, including sex and sexual orientation,"[30] was not intended to prohibit discrimination of every kind. Specifically, it was not intended to "change the ordinary meaning of the word 'marriage'"[31] such that impermissible discrimination occurred when marriage licenses were not granted to same-sex couples along with heterosexual couples.

In reaching this conclusion, the *Dean* court engaged in the analysis it had employed in *National Organization for Women v. Mutual of Omaha Insurance Co., Inc.*[32] In *NOW*, the court considered whether or not the defendant insurer's practice of charging higher health premiums for women violated the HRA. The court noted that

> [i]t is true that it can be argued with some persuasion that the "plain language" of the [HRA] prohibits discrimination based on gender in the services offered by insurance companies. Significantly, however, the [HRA] contains no language purporting explicitly to regulate insurance premium practices. If the Council had intended to effect such a dramatic change in insurance rate-setting practices, it is reasonable to assume that there would have been at least some specific reference to it in the language of the [HRA] or, at least, within its legislative history. Under the circumstances,

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[30] *Id.* at 319.

[31] *Id.* at 320.

[32] 531 A.2d 274 (D.C. 1987) ("*NOW*").

> therefore, we think it appropriate to look to the [HRA's] statutory context and its legislative history to ascertain whether its scope extends to actuarial pricing practices.[33]

The court further observed that, in instances where the legislative history of the HRA is silent as to a particular topic, "courts can sometimes find guidance by reading it in conjunction with other statutes relating to the same subject."[34]

Accordingly, the court read the HRA in conjunction with the statute that allowed the gender-based differential in insurance rates that the *NOW* petitioners alleged violated the HRA, and which had existed prior to the HRA, and examined its relationship with the same.

In reaching the conclusion that the insurance practice was not in conflict with the HRA, the court afforded "great weight"[35] to the fact that the District's Corporation Counsel[36] had advised the D.C. Council, pursuant to a request for an opinion on the matter, that life insurance set-backs for women did not violate the HRA, as well as the fact that the Council relied upon this opinion when it subsequently increased life insurance set-backs for

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[33] *Id.* at 276 (citations omitted).

[34] *Id.* at 277.

[35] We add that the Corporation Counsel's interpretation of the [HRA], while not binding on this court, is entitled to great weight." *NOW*, 531 A.2d at 278 (citing *Jordan v. District of Columbia*, 362 A.2d 114, 118 (D.C. 1976).

[36] The District's Attorney General was formerly referred to as the Corporation Counsel.

women from three years to six years. Clearly, the court wrote,

> the Council did not enact the insurance set-back provisions in ignorance of their potential conflict with the [HRA]. ... Rather, it did so only after consulting the Corporation Counsel and expressly considering the potential impact of the [HRA] on those provisions. In such a situation, it is proper to view the later act "as a legislative interpretation of the earlier act ... in the sense that it aids in ascertaining the meaning of the words as used in their contemporary setting."... We should construe the two statutes to be in harmony if reasonably possible. ... To do so requires us to conclude that the Council did not intend the Act to include gender-based insurance pricing within its scope.[37]

Applying the analysis in *NOW*, the court in *Dean* looked at the legislative history of the HRA in conjunction with District laws concerning marriage as they existed when *Dean* was decided. The court determined that same-sex marriage could not possibly be within the scope of the HRA, and would necessarily be missing from its legislative history, because "by legislative definition - as we have seen - 'marriage' requires persons of opposite sexes; there cannot be discrimination against a same-sex marriage if, by independent statutory definition

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[37] *Id.* at 278 (citations omitted).

extended to the [HRA], there can be no such thing."[38] The court held that it could not "conclude that the Council ever intended to change the ordinary meaning of the word 'marriage' simply by enacting the [HRA],"[39] and that, therefore, the denial of marriage licenses to same-sex couples did not contravene the HRA.

The decisions in *Dean* and *NOW* are instructive. They both clarify that, in order to determine whether or not a particular form of discrimination is of the kind that the HRA is intended to prohibit, both the Board and the courts should consider the legislative history of the HRA, the current statutory context, and legislative intent. A consideration of these factors demonstrates that the Initiative is not a proper subject for initiative in the District.

While neither the HRA nor its legislative history explicitly mentions same-sex marriage, it is without question that the HRA must "be read broadly to eliminate the many proscribed forms of discrimination in the District."[40] Since JAMA's enactment, the District recognizes same-sex marriages that have been properly entered into, performed, and recognized by other jurisdictions. This did not exist when *Dean* was decided. Consequently, couples who fall within JAMA's purview are entitled to the same benefits of marriage that are afforded heterosexual married couples, and the denial of these benefits to married

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[38] *Dean*, 653 A.2d at 320.

[39] *Id.*

[40] *Id.*

couples on the basis of the sexual orientation of the individuals who comprise the couples now constitutes a "proscribed form of discrimination." It is clear that this result is the intent of the Council, which voted 12-1 to pass JAMA. The Initiative seeks to deny recognition to JAMA marriages on the basis of the sexual orientation of the individuals who comprise the couples. As a result, the Board finds, and both the District's Attorney General and the General Counsel for the Council agree, that the Initiative authorizes or would authorize discrimination proscribed by the HRA and is therefore not a proper subject for initiative.

Counsel for the Proposers have argued before the Board that the Board is collaterally estopped from finding that the Initiative is not a proper subject for initiative because the Board argued in the D.C. Superior Court that "[i]f the Court denies the Petitioners' request for injunctive relief and [JAMA] becomes law by way of the expiration of the Congressional review period, they may still avail themselves of the initiative process."[41] This argument is without merit. Stating that a party may avail themselves of the initiative process is not the equivalent of asserting that the party is entitled to actually have the initiative appear on the ballot; in addition to meeting all other prerequisites for ballot access, a proposed initiative measure must be a proper subject for initiative or it must be refused by the Board. The Proposers have done exactly what the Board said they may do - they have availed themselves of the initiative process. They submitted

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[41] Board Preliminary Injunction Opposition at 21.

a proposed initiative measure that the Board considered in its customary fashion. Because "the Board did not refuse to consider" the Initiative, the Proposers' "right to [initiative] has not been deprived."[42]

IV. Conclusion

Under current law, the District recognizes same-sex marriages validly performed in other jurisdictions.[43] The proposed Initiative seeks to prohibit the District from continuing to recognize these same-sex marriages. The Initiative instructs that "only marriage between a man and a woman is valid or recognized in the District of Columbia."[44] If passed, the Initiative would, in contravention of the HRA, strip same-sex couples of the rights and responsibilities of marriages currently recognized in the District.

The District's Initiative, Referendum and Recall Procedures Act requires the Board to refuse to accept referenda and initiatives which violate the HRA. Because the Initiative would authorize discrimination prohibited by the HRA, it is not a proper subject for initiative, and may not be accepted by the Board.[45]

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[42] *Jackson* at 2.

[43] D.C. Code §46-405.01 (added by §3(b) of the Jury and Marriage Amendment Act of 2009).

[44] Summary Statement, Initiative.

[45] The Proposers and other supporters of the Initiative have requested that the Board accept the Initiative and thereby allow voters to be heard on the issue of the recognition of same-sex marriage in the District. As it stated during the

Accordingly, it is hereby:

ORDERED that the Initiative is **RECEIVED BUT NOT ACCEPTED** pursuant to D.C. Official Code § 1-100 1.16(b)(2).

November 17, 2009
Date

s/Errol R. Arthur
Errol R. Arthur
Chairman, Board of
Elections and Ethics

Charles R. Lowrey, Jr.
Member, Board of
Elections and Ethics

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proceedings concerning the Referendum, the Board, as an entity responsible for ensuring the integrity of a very critical aspect of the democratic process, is particularly sensitive to issues of fairness and due process. However, the Board must also act in a manner which adheres to its statutory obligations.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

HARRY R. JACKSON, JR., a registered, qualified voter in the District of Columbia and proponent of the Marriage Initiative of 2009,

1100 First Street, S.E., Apt. 1310
Washington, D.C. 20003

ROBERT KING, a registered, qualified voter in the District of Columbia and proponent of the Marriage Initiative of 2009,

3102 Apple Road, N.E.
Washington, D.C. 20018

WALTER E. FAUNTROY, a registered, qualified voter in the District of Columbia and proponent of the Marriage Initiative of 2009,

Civil Action No. _____

[Next Court Event: none scheduled]

4105 17th Street, N.W.
Washington, D.C.
20011

JAMES SILVER, a registered, qualified voter in the District of Columbia and proponent of the Marriage Initiative of 2009,

7123 Chestnut Street, N.W.
Washington, D.C.
20012

ANTHONY EVANS, a registered, qualified voter in the District of Columbia and proponent of the Marriage Initiative of 2009,

4021 7th Street, N.E., Apt. #4
Washington, D.C.
20017

DALE E. WAFER, a registered, qualified voter in the District of Columbia and proponent of the Marriage Initiative of 2009,

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4021 19th Street, N.E.
Washington, D.C.
20018

MELVIN DUPREE, a registered, qualified voter in the District of Columbia and proponent of the Marriage Initiative of 2009,

1904 Naylor Road, S.E.
Washington, D.C.
20020

and HOWARD BUTLER, a registered, qualified voter in the District of Columbia and proponent of the Marriage Initiative of 2009,

1301 Whittier Place, N.W.
Washington, D.C.
20012

Petitioners,

v.

DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS, an agency of the District of Columbia government,

441 4th Street, N.W., Suite 250 Washington, D.C. 20001

Respondent.

PETITION FOR REVIEW OF AGENCY DECISION AND FOR WRIT IN THE NATURE OF MANDAMUS

Petitioners Harry R. Jackson, Jr., Robert King, Walter E. Fauntroy, James Silver, Anthony Evans, Dale E. Wafer, Melvin Dupree, and Howard Butler (the "Proponents") petition this Court, pursuant to D.C. Code § 1-1001.16(b)(3), for review of the decision of the District of Columbia Board of Elections and Ethics ("the Board") rejection of the Marriage Initiative of 2009 ("the Initiative"), for a writ in the nature of mandamus compelling the Board to accept the Proponents' Initiative because the Board lacks the authority to reject the Initiative under the Initiative, Referendum, and Recall Charter Amendments Act of 1978, D.C. Code §§ 1-204.101 to 1-204.115, and for a declaration that the Initiative does not violate the District of Columbia Human Rights Act of 1977, D.C. Code § 2-1401.01 *et*

seq. A true and correct copy of the decision from the Board is attached to this petition.

INTRODUCTION

1. The people of the District of Columbia reserved to themselves the sovereign right of initiative in the Initiative, Referendum, and Recall Charter Amendments Act of 1978, D.C. Code §§ 1-204.101 to 1-204.115 (the "Charter Amendments Act").

2. The right of initiative provides the people with lawmaking authority coextensive with that of the District of Columbia Council, restricting the citizens' lawmaking authority solely on the subject of "appropriations." D.C. Code § 1-204.101(a).[1]

3. The Proponents seek to exercise their right of initiative by placing on the ballot a measure that would affirm the definition of marriage long understood to be the law in the District of Columbia: "Only marriage between a man and a woman is valid or recognized in the District of Columbia."

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[1] The Charter Amendments Act provides in pertinent part:

> The term "initiative" means the process by which the electors of the District of Columbia may propose laws (except laws appropriating funds) and present such proposed laws directly to the registered qualified electors of the District of Columbia for their approval or disapproval.

D.C. Code § 1-204.101.

4. To that end, the Proponents filed the Marriage Initiative of 2009 with the Board on September 1, 2009. It provides the voters of the District of Columbia the opportunity to accept or reject the District's longstanding definition of marriage as being a legal union between a man and a woman – a subject squarely within the lawmaking authority of the citizenry.

5. The Board held a public hearing on October 26, 2009, to determine whether the Initiative presented a proper subject for the initiative process.

6. Counsel to the Board announced at the October 26, 2009, that the Initiative was in proper legislative form and the Proponents had duly complied with the ministerial requirements of the Initiative, Referendum, and Recall Procedures Act, D.C. Code § 1-1001.16 (the "Initiative Procedures Act" or the "IPA"), having filed their Initiative Committee in accordance with D.C. Code §§ 1-1102.04 and 1-1102.06

7. On November 17, 2009, the Board denied Proponents' Initiative solely on the basis that it "authorizes or would authorize discrimination proscribed by the HRA [District of Columbia Human Rights Act of 1977, D.C. Code § 2-1401.01 *et seq.*] and is therefore not a proper subject for initiative." (*See* District of Columbia Board of Elections and Ethics decision dated November 17, 2009, hereinafter "Board's Decision," at p. 11).

8. The Initiative does not seek to appropriate funds, nor did the Board find in rejecting the

Initiative that it constituted an "appropriation" of funds.

9. The Proponents now petition this Court, pursuant to D.C. Code § 1-1001.16(b)(3), for review of the Board's decision and, for a writ in the nature of mandamus compelling the Board to accept the Initiative for the reason that the sole subject matter prohibition for an initiative is "appropriations," which this Initiative does not propose to do.

10. The Board's determination that the Initiative is invalid because it "violates the HRA" is erroneous because the HRA restriction imposed by the Council on the people's right of initiative is an impermissible requirement not authorized by the Charter Amendments Act. This additional subject matter restriction impermissibly conflicts with the broad nature of the right of initiative reserved by the people in the Charter Amendments Act.

11. Proponents further seek the declaration of this Court that the Initiative does not violate the HRA, because this Court and the Court of Appeals have consistently held that the regulation of the marital relationship falls outside the intended scope of the HRA.

12. The citizens' right under the Home Rule Charter to legislate through the initiative is coextensive with that of the District of Columbia Council on all subjects *other* than making appropriations.

13. The Council has enacted laws governing marriage—and is so engaged at the present time. The citizens are likewise entitled to legislate on the subject of the definition of marriage, without the additional impediments ostensibly imposed on their initiative powers by the IPA, D.C. Code § 1-1001.16(b)(1).

14. This Court and the Court of Appeals have consistently held that where the IPA conflicts with the Charter Amendments Act, the Charter Amendments Act prevails. *Price v. District of Columbia Bd. of Elections & Ethics*, 645 A.2d 594, 599 (D.C. 1994) ("[T]o the extent any IPA provision is inconsistent with the Charter Amendments, the latter controls."); *Convention Ctr. Referendum Comm. v. District of Columbia Bd. of Elections & Ethics*, 441 A.2d 889, 915 (D.C. 1981) (en banc) ("As implementing legislation [of the Charter Amendments Act], the Initiative Procedures Act is valid, of course, only insofar as it conforms to the underlying Charter Amendments.").

JURISDICTION

15. This Court has subject matter jurisdiction of this case pursuant to D.C. Code § 11-921 and D.C. Code § 1-1001.16(b)(3), which provides in pertinent part that "[i]f the Board refuses to accept any initiative or referendum measure submitted to it, the person or persons submitting such measure may apply, within 10 days after the Board's refusal to accept such measure, to the Superior Court of the District of Columbia for a writ in the nature of

mandamus to compel the Board to accept such measure."

16. This Court has *in personam* jurisdiction over the Board.

THE PARTIES

17. Petitioner Harry R. Jackson, Jr. is a qualified registered voter in the District and an official proponent of the Initiative. He has standing pursuant to D.C. Code § 1-1001.16(b)(3) to seek review of the Board's decision, a declaration that the HRA restriction imposed by the Council on the people's right of initiative is an impermissible requirement not authorized by the Charter Amendments Act, a declaration that the Initiative does not violate the HRA, and a writ in the nature of mandamus compelling the Board to accept the Initiative.

18. Petitioner Robert King is a qualified registered voter in the District and an official proponent of the Initiative. He has standing pursuant to D.C. Code § 1-1001.16(b)(3) to seek review of the Board's decision, a declaration that the HRA restriction imposed by the Council on the people's right of initiative is an impermissible requirement not authorized by the Charter Amendments Act, a declaration that the Initiative does not violate the HRA, and a writ in the nature of mandamus compelling the Board to accept the Initiative.

19. Petitioner Walter E. Fauntroy is a qualified registered voter in the District and an official proponent of the Initiative. He has standing pursuant to D.C. Code § 1-1001.16(b)(3) to seek review of the Board's decision, a declaration that the HRA restriction imposed by the Council on the people's right of initiative is an impermissible requirement not authorized by the Charter Amendments Act, a declaration that the Initiative does not violate the HRA, and a writ in the nature of mandamus compelling the Board to accept the Initiative.

20. Petitioner James Silver is a qualified registered voter in the District and an official proponent of the Initiative. He has standing pursuant to D.C. Code § 1-1001.16(b)(3) to seek review of the Board's decision, a declaration that the HRA restriction imposed by the Council on the people's right of initiative is an impermissible requirement not authorized by the Charter Amendments Act, a declaration that the Initiative does not violate the HRA, and a writ in the nature of mandamus compelling the Board to accept the Initiative.

21. Petitioner Anthony Evans is a qualified registered voter in the District and an official proponent of the Initiative. He has standing pursuant to D.C. Code § 1-1001.16(b)(3) to seek review of the Board's decision, a declaration that the HRA restriction imposed by the Council on the people's right of initiative is an impermissible requirement not authorized by the Charter Amendments Act, a declaration that the Initiative

does not violate the HRA, and a writ in the nature of mandamus compelling the Board to accept the Initiative.

22. Petitioner Dale E. Wafer is a qualified registered voter in the District and an official proponent of the Initiative. He has standing pursuant to D.C. Code § 1-1001.16(b)(3) to seek review of the Board's decision, a declaration that the HRA restriction imposed by the Council on the people's right of initiative is an impermissible requirement not authorized by the Charter Amendments Act, a declaration that the Initiative does not violate the HRA, and a writ in the nature of mandamus compelling the Board to accept the Initiative.

23. Petitioner Melvin Dupree is a qualified registered voter in the District and an official proponent of the Initiative. He has standing pursuant to D.C. Code § 1-1001.16(b)(3) to seek review of the Board's decision, a declaration that the HRA restriction imposed by the Council on the people's right of initiative is an impermissible requirement not authorized by the Charter Amendments Act, a declaration that the Initiative does not violate the HRA, and a writ in the nature of mandamus compelling the Board to accept the Initiative.

24. Petitioner Howard Butler is a qualified registered voter in the District and an official proponent of the Initiative. He has standing pursuant to D.C. Code § 1-1001.16(b)(3) to seek review of the Board's decision, a declaration that the

HRA restriction imposed by the Council on the people's right of initiative is an impermissible requirement not authorized by the Charter Amendments Act, a declaration that the Initiative does not violate the HRA, and a writ in the nature of mandamus compelling the Board to accept the Initiative.

25. The respondent in this case is the Board, a three-member body created by statute. D.C. Code § 1-1001.03. Because of a vacancy on the three-member election board, Chairman Errol R. Arthur and Board Member Charles Lowery, Jr. are currently the only sitting members. The Board's duties include overseeing the initiative and referendum process. D.C. Code § 1-1001.16. The Board is specifically tasked with determining whether a proposed initiative presents a proper subject for the initiative process. D.C. Code § 1-1001.16(b)(1).

THE INITIATIVE PROCESS

26. The right of initiative enables five percent of the registered voters in the District to "propose laws (except laws appropriating funds) and present such proposed laws directly to the registered qualified electors of the District of Columbia for their approval or disapproval." D.C. Code §§ 1-204.101(a), 1-204.102.

27. If a majority of the voters participating in an initiative "adopt legislation by initiative, then the adopted initiative . . . shall be an act of the Council upon the certification of the vote on such initiative . .

. by the District of Columbia Board of Elections and Ethics, and such act shall become law subject to the provisions of § 1-206.02(c)." D.C. Code § 1-204.105.

28. Under the Initiative Procedures Act, D.C. Code § 1-1001.16, there are certain ministerial requirements established by the Council for undertaking the people's legislative powers, starting with the requirement that the initiative process begins with a voter or voters filing a proposed initiative measure with the Board. It must include the full text of the initiative measure, a short title of the measure to be proposed, and a summary statement of not more than 100 words. D.C. Code § 1-1001.16(a)(1).

29. Accompanying the proposed initiative measure, the voter or voters must submit an affidavit testifying to their name, address, and status as a registered qualified elector of the District of Columbia. D.C. Code § 1-1001.16(a)(1).

30. Upon receipt of the initiative measure, the Board undertakes a review to determine whether the measure presents a proper subject for an initiative under Title IV of the District's Self-Government and Governmental Reorganization Act, D.C. Code § 1-201.1 *et seq.* (popularly known as the "Home Rule Act"), or under one of four other grounds, including that the measure "authorizes, or would have the effect of authorizing, discrimination" prohibited by the HRA. D.C. Code § 1-1001.16(b)(1).

31. If the Board refuses to accept a proposed initiative, it endorses the measure as being "received

but not accepted" and "retain[s] the measure pending appeal." D.C. Code § 1-1001.16(b)(2). At that point, the persons submitting the initiative measure have ten (10) days to apply to this Court "for a writ in the nature of mandamus to compel the Board to accept such measure." D.C. Code § 1-1001.16(b)(3). This Court is to expedite consideration of the matter. D.C. Code § 1-1001.16(b)(3).

32. If an initiative measure is accepted, the Board is responsible for preparing, adopting, and arranging for publication of a proposed summary statement, short title, and legislative form. During the ten (10) calendar days following publication, a voter who objects to the proposed summary statement, short title, and legislative form may seek expedited review by this Court. Absent such judicial review, the proposed summary statement, short title, and legislative form are deemed to be accepted by the Board. D.C. Code § 1-1001.16(c)-(e).

33. Once the proposed summary statement, short title, and legislative form are accepted by the Board, the Board provides the proposer with an original petition form to be used in printing petition sheets for circulation. The proposer must secure the signatures of five percent of the registered voters in the District, including five percent of the registered voters in at least five of the eight wards, to submit the initiative petition to the Board. D.C. Code § 1-1001.16(g)-(j).

34. Before accepting an initiative petition, the Board checks, among other things, whether the

petition is "not in the proper form" or "on its face clearly bears an insufficient number of signatures." However, the Board is not required to certify whether the petition contains the minimum number of "valid" signatures until thirty (30) calendar days after the petition has been accepted. D.C. Code § 1-1001.16(k) & (o).

35. Once the signatures have been verified, the Board certifies that the initiative will appear on the ballot, and schedules an election on the initiative measure at the next primary, general, or city-wide special election held at least 90 days after the date on which the measure was certified as qualified to appear on the ballot. D.C. Code § 1-1001.16(p)(1).

36. An initiative measure which has been ratified by a majority of the registered qualified electors voting on the measure will be sent to the United States Congress for review. If the initiative measure is not disapproved during the thirty day congressional review period, the initiative measure will then take effect as the law of the District at the end of the review period. D.C. Code § 1-1001.16(r)(1).

MARRIAGE INITIATIVE OF 2009

37. On September 1, 2009, the Proponents filed the Marriage Initiative of 2009 with the Board. The proposed initiative would add a provision to the District's marriage code, affirming that: "Only marriage between a man and a woman is valid or recognized in the District of Columbia."

38. The next day, September 2, 2009, the Board published notice on its website that it had received the Marriage Initiative of 2009.

39. Eight days later, on September 10, 2009, the Board sent a letter to the Proponents informing them that a hearing on the Initiative had been tentatively scheduled for October 26, 2009, at One Judiciary Square, 441 4th Street, N.W., Suite 280, Washington, D.C. 20001. The letter further informed the Proponents that if they wished to submit a memorandum in support of the Initiative, they should do so by October 16, 2009.

40. On September 18, 2009, the Board published notice in the *D.C. Register* that it had received the Initiative and scheduled a public hearing on the Initiative for October 26, 2009, in the One Judiciary Square Building.

41. On October 16, 2009, the Proponents timely filed a legal memorandum with the Board, explaining why the Marriage Initiative of 2009 presented a proper subject for the initiative process.

42. Two days later, on October 18, 2009, the Board posted a "Public Notice" on its website announcing that there would be a Special Board Meeting on Monday, October 26, 2009 at 10:00 a.m. to determine whether the Marriage Initiative of 2009 was a proper subject for an initiative in the District.

43. Just over a week later, on October 26, 2009, the Board held a public hearing on the Marriage Initiative of 2009 to determine whether it presents a

proper subject for the initiative process. The Proponents attended the hearing and provided testimony in support of the Initiative.

44. At the hearing, counsel to the Board publicly announced that the Marriage Initiative of 2009 is in proper legislative form and in compliance with the District of Columbia Office of Campaign Finance filing requirements.

45. On November 17, 2009, the Board rejected the Marriage Initiative of 2009 solely on the grounds that it did not present a proper subject for the initiative process under the Initiative Procedures Act because it "authorizes or would authorize discrimination proscribed by the HRA . . . ." (Board's Decision at p. 11). The Board marked the Initiative as "received but not accepted," and now holds the Initiative pending this Court's review. D.C. Code § 1-1001.16(b)(2). (Board's Decision at p. 13).

46. The Board's rejection of the Initiative began the ten (10) day time period for applying to this Court for a writ of mandamus ordering the Board to accept the Initiative. D.C. Code § 1-1001.16(b)(3). By operation of law, the ten (10) day time period is set to expire on or about November 30, 2009.

47. The Proponents now apply to this Court, pursuant to D.C. Code § 1-1001.16(b)(3), for review of the Board's decision and a "writ in the nature of mandamus" compelling the Board to accept the Initiative.

COUNT I

THE HRA RESTRICTION CONTAINED IN THE INITIATIVE PROCEDURES ACT IS AN INVALID AND IMPERMISSIBLE RESTRAINT ON THE PEOPLE'S RIGHT OF INITIATIVE

48. The people of the District of Columbia reserved to themselves the right of initiative in the Charter Amendments Act. The Charter Amendments Act amended the Home Rule Act, reserving to the people the power to adopt initiatives in a manner coextensive with the power of the Council to adopt legislative measures. D.C. Code § 1-204.101(a).

49. The lone substantive limitation on the people's right of initiative provided by the Charter Amendments Act is the exception for "laws appropriating funds." D.C. Code § 1-204.101(a). Matters relating to the budget process remain within the control of the Mayor and the Council.

50. The Council in 1979 passed Initiative Procedures Act, D.C. Code § 1-1001.16, to facilitate and regulate the people's right of initiative. Because the people's right of initiative is codified within the Charter, and is not merely a creature of statute, the Council cannot substantively alter or amend the initiative right. Rather, that right can only be substantively altered through an amendment of the Charter.

51. However, the IPA improperly imposes an additional substantive limitation, not found in the

Home Rule Act or the Charter Amendments Act, on the people's right of initiative—the HRA restriction. D.C. Code § 1-1001.16(b)(1)(C). It purports to entirely exclude from the people's right of initiative any measure said to "authorize[], or . . . have the effect of authorizing, discrimination prohibited under" the HRA. D.C. Code § 1-1001.16(b)(1)(C).

52. The Board relied upon this legally impermissible additional subject matter restriction to deny approval of the Marriage Initiative of 2009.

53. The Council's attempted imposition of an additional substantive limitation on the right of initiative seeks to improperly narrow the right of initiative in a manner inconsistent with the broad nature of the right reserved by the people to themselves in the Charter Amendments Act.

54. Because the HRA restriction impermissibly conflicts with the right reserved in the Charter Amendments Act, the restriction is invalid and the Board erred in relying on the restriction to disapprove the Marriage Initiative of 2009.

55. This Court and the Court of Appeals have both ruled that the Charter Amendments control over inconsistent provision of the IPA. *Price*, 645 A.2d at 599 ("[T]o the extent any IPA provision is inconsistent with the Charter Amendments, the latter controls."); *Convention Ctr.*, 441 A.2d at 915 ("As implementing legislation [of the Charter Amendments Act], the Initiative Procedures Act is valid, of course, only insofar as it conforms to the underlying Charter Amendments."). Thus, to the

extent any IPA provision is inconsistent with the Charter Amendments, the latter controls.

COUNT II

THE MARRIAGE INITIATIVE OF 2009 DOES NOT VIOLATE THE HRA BECAUSE REGULATION OF THE MARITAL RELATIONSHIP FALLS OUTSIDE THE INTENDED AND ACTUAL SCOPE OF THE HRA

56. This Court and the Court of Appeals have both ruled that the "City Council consciously chose not to make the language of the Human Rights Act applicable to the regulation of the marital relationship." *Dean v. District of Columbia*, No. 90-13892, slip op. at *4-8 (D.C. Super. Dec. 30, 1991), *aff'd*, *Dean v. District of Columbia*, 653 A.2d 307, 318-20 (D.C. 1995) (emphasis added).

57. The text of the HRA and its legislative history demonstrate that the HRA was never intended to implicate the District's marriage laws. Instead, as the Council has explained, the Act "should . . . be read in harmony with and as supplementing other laws of the District," including the District's marriage laws. Comm. on Public Services and Consumer Affairs, Report on Bill No. 2-179, Human Rights Act of 1977, at 3 (July 5, 1977) (citations and internal quotations omitted).

58. This interpretation of the HRA remains unaltered by the Court of Appeals or the Council.

59. Thus, as a matter of law, the HRA restriction is not applicable to the Marriage Initiative of 2009, and the Board erred in applying the restriction to the Initiative.

COUNT III

THE MARRIAGE INITIATIVE OF 2009 IS CONSISTENT WITH THE HRA

60. The Marriage Initiative of 2009 does not authorize or have the effect of authorizing discrimination on the basis of sexual orientation and/or sex in violation of the HRA.

61. The Initiative is silent with regard to sexual orientation. No couples of the same-sex, regardless of their declared sexual orientation, can be issued a marriage license.

62. The Initiative also treats men and women alike—they are permitted to marry people of the opposite sex, but not people of their own sex.

63. Thus, the Marriage Initiative of 2009 does not discriminate in violation of the HRA, and the Board erred in holding that the Initiative runs afoul of the HRA.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Petitioners request that this Court grant the following relief:

64. Expedite consideration of this matter as required by D.C. Code § 1-1001.16(b)(3).

65. Declare that the additional subject matter restriction imposed by the IPA with respect to the application of the HRA to proposed initiatives is inconsistent and conflicts with the Charter Amendments Act and cannot operate as a bar to the citizens' right to the initiative in the District of Columbia generally.

66. Declare that the Board improperly relied on the HRA as grounds for denying the Proponents' rights to begin gathering signatures on the Marriage Initiative of 2009, thus allowing the definition of marriage to ultimately be decided by the voters of the District of Columbia exercising their legislative powers.

67. Declare that the Initiative does not authorize or have the effect of authorizing discrimination in violation of the HRA.

68. Issue a "writ in the nature of mandamus," pursuant to D.C. Code § 1-1001.16(b)(3), ordering the Board to accept the Initiative.

69. Grant other declaratory relief and permanent and temporary injunctive relief as may be necessary to ensure that the Initiative is accepted by the Board and that the initiative process moves forward.

70. Grant such other and further relief, including attorney's fees and costs, as the Court may deem just and proper under the circumstances.

Respectfully submitted this the 18th day of November, 2009.

s/Cleta Mitchell
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